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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 381.

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONER Z. & F. ASSETS REALIZATION CORPORATION.

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Opinions Below.

The opinion of the United States Court of Appeals for the District of Columbia (R. 335) is reported in 114 F. (2d) 464. That Court unanimously affirmed an order of the District Court (R. 298) granting the motion of respondents Hull and Morgenthau to dismiss the complaint and the petitioner-intervener's bill of intervention, and also granting the motion of the respondent-intervener, Lehigh Valley Railroad Company for summary judgment

dismissing the complaint and the petitioner-intervener's bill of intervention. The opinion of the District Court (R. 295) is reported in 31 F. Supp. 371.

Jurisdiction.

The jurisdiction of this Court is based upon Title 28 of the United States Code Annotated, Section 347. The petition for writ of certiorari was filed the 29th day of August, 1940, and was granted October 14, 1940.

The District Court of the District of Columbia had jurisdiction to entertain this suit upon the authority of *Houston, Secretary of the Treasury* v. *Ormes,* 252 U. S. 469; *Mellon* v. *Orinoco Iron Co.,* 266 U. S. 121; *Doerschuck* v. *Mellon,* 55 Fed. (2d) 741, 60 App. D. C. 383; *Elg* v. *Perkins, Secretary of Labor; Edward J. Shaughnessy, Acting Commissioner of Immigration, and the Secretary of State,* 307 U. S. 325.

The jurisdiction of the District Court is based, therefore, upon Title 18, §§41, 43 and 44 of the Code of the District of Columbia and 28 U. S. Code, Section 41, subdivision (1)(a).

Statutes and Treaties Involved.

The statutes and treaties involved are set forth in the appendix.

Questions Presented.

The questions involved are:

First. Whether the respective rights of the petitioners and the respondent-intervener to receive payment from

the special fund created by the Settlement of War Claims Act involved a political question not justiciable by the courts.

Second. Whether the certificate of the Secretary of State certifying the awards is conclusive and not subject to judicial review.

Third. Whether, after the retirement of the German Commissioner, the Umpire and the American Commissioner were authorized to function as a commission and make awards.

Fourth. Whether the alleged awards now in question are not void because, when the American Commissioner and the Umpire assumed to make them, the sole question pending before the commission was whether there was proof of fraud that justified a rehearing.

Fifth. Whether, even if properly constituted, the Mixed Claims Commission was empowered to grant a rehearing.

Sixth. Whether the Mixed Claims Commission, even if properly constituted, was authorized to grant an award to the Agency of Canadian Car & Foundry Company, Ltd., whose stock was entirely owned by the parent Canadian company, a non-American national.

Seventh. Whether, in view of the fact that issues of fact were involved, respondent-intervener's application for summary judgment should have been denied.

Statement.

Petitioner, and others similarly situated, are holders of awards granted long prior to June 15, 1939, and in most cases prior to the passage of the Settlement of War Claims Act of 1928 (R. 3). This action is brought

by petitioner in behalf of itself and all other American holders of awards granted prior to June 15, 1939, for judgment declaring, among other things, that the decision of the Mixed Claims Commission of October 16, 1930, dismissing the sabotage claims, is final and binding, that alleged awards granted to the Lehigh Valley Railroad Company, Agency of Canadian Car & Foundry Co., Ltd., Bethlehem Steel Company and others be declared null and void, and that the Secretary of the Treasury be directed to pay to petitioner and others similarly situated the balance remaining in the German Special Deposit Account to the extent provided for in the Settlement of War Claims Act of 1928.

The five awards to petitioner, Z. & F. Assets Realization Corp., with interest to January 1, 1928, aggregate the sum of $1,175,918.78, on account of which said petitioner has received the sum of $864,048.31, leaving a balance unpaid of $311,870.47, which with interest to January 15, 1936, makes a total aggregate unpaid balance of $599,373.96 (R. 3).

The petitioner, American-Hawaiian Steamship Company, is the holder of five awards totalling, with interest to January 1, 1928, $4,620,131.57, on account of which it has received $3,300,000, leaving a balance unpaid in excess of $1,250,000, which, with interest, makes a total in excess of $2,000,000 (R. 23).

In contrast to the awards to these old awardholders, the sabotage claims, including those of the Lehigh Valley Railroad Company, Bethlehem Steel Company, Agency of Canadian Car & Foundry Co., Ltd., several insurance companies and others, were, after hearing, dismissed on October 16, 1930 (R. 224, 260), the opinion pointing out that fraud and perjury permeated the evidence adduced by both sides (R. 261-265).

Nine years later, years after a new Umpire and new Commissioners had been appointed, and over eleven years after the enactment of the Settlement of War Claims Act, and long after the Commission was *functus officio* as to their claims, these sabotage claimants, after having lost their case in 1930, obtained alleged awards, dated October 30, 1939, from what is alleged to have been a Mixed Claims Commission, United States *and* Germany, but what was in fact nothing more than the American Commissioner and Umpire after the retirement of the German Commissioner.

The Lehigh Valley Railroad Company was granted an alleged award in the sum of $9,900,322.77 with interest from January 6, 1920 (R. 69), which, with interest from said last mentioned date to January 1, 1928, amounts to more than $13,750,000.

The Agency of Canadian Car and Foundry Company, Ltd., was granted an alleged award in the sum of $5,871,105.20 with interest from January 31, 1917 (R. 63), which, with interest from said last mentioned date to January 1, 1928, amounts to more than $8,750,000.

The Bethlehem Steel Company was granted an alleged award in the sum of $1,886,491.18 with interest from July 30, 1916 (R. 64) which, with interest from said last mentioned date to January 1, 1928, amounts to more than $2,900,000, and was also granted an alleged award of interest on $850,412.51 from July 30, 1916, which makes said last mentioned award approximately $500,000, or a total of more than $3,400,000.

The alleged awards were made after the retirement of the German Commissioner and over the protest of his Government that the Commission had long since lost jurisdiction to make an award, and contrary to the specific requirement of a written certification of disagreement as a condition precedent to an award by the Umpire.

The alleged awards were made without any testimony being taken as to the extent of the damages. The fixing of the amount of damages was *ex parte*.

If the sabotage claimants are entitled to payment from the Special Deposit Fund, they will strip the fund of approximately $23,000,000 left in that fund, which would otherwise be paid out to 304 old award holders whose awards still remain unpaid to the extent of approximately $63,000,000. Approximately 6,000 other old award holders have received payment of their awards in full.

The Secretaries of State and Treasury* are merely nominal defendants—stakeholders between adverse claimants to a Congressional fund. They were made nominal defendants because the Congressional Act had made them the means by and through which the Congressional intent should be effected, it being provided that payments from the fund should be by the Secretary of the Treasury on certification by the Secretary of State.

The District Court held the Secretary's certification conclusive as to the validity of the awards.

Relying upon certain allegations in the respondent-intervener's answer, the District Court stated that the Secretary's certificate had been made before the commencement of this suit (R. 297, 334), with the implied suggestion that the Secretary could forestall judicial review by making his certificate before an Old Award Holder had time to begin suit. This interpretation of its opinion is one which we do not believe the Court intended to be placed thereon, (1) because such an interpretation went far beyond the contention of intervener-respondent below, that the certificate was final irrespective of the pre-

* The respondents, Hull and Morganthau, moved to dismiss the complaint on the grounds set forth in their notice of motion (R. 294). The contentions of the petitioner in opposition thereto are set forth in Points I and II herein.

cise second when suit was begun, (2) because of subsequent correction by the Court of its opinion so as to point out that the certificate was only made after the summons and complaint in this suit had been filed and subpoena issued (R. 334), [and while service was attempted to be effected upon the Secretary of State (R. 318)], and (3) because the authorities are clear that a suit cannot be defeated by any act done after the suit has properly been begun by filing in the District Court and notice thereof. Under such circumstances, the Court will restore the *status quo* as of the time of the commencement of the action (*Texas & N. O. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475).

There is raised here admittedly no question as to the right of the United States or of the executive branch to seek compensation for war claims against Germany, nor is there any question as to the propriety of the executive branch, if it so desires, to request Congress to make further appropriations for that purpose.

There is admittedly no question as to whether or not any German funds should be appropriated to any of the claims, whether of the old awardholders or of the sabotage claimants.

The funds involved are admittedly the property of the United States and have concededly been appropriated by the Congress for the purposes stated in the War Settlement Act of 1928, namely: payment of proper awards certified to the Secretary of the Treasury by the Department of State (see Appendix, vii).

The funds admittedly being insufficient to satisfy in full the awards of the old awardholders, the question is whether the claimants (intervener-respondent) for the reasons stated shall share in these funds with the old awardholders (petitioners) who contend they should not.

The Secretary of the Treasury, charged with the duty

of disbursing these funds, as we understand his position, is no more than a stakeholder, charged with the duty of making payment to such claimants as may be entitled to the fund under the terms of the Settlement of War Claims Act of 1928.

The Secretary of State, if we understand his position rightly, takes an attitude similar to that of the Secretary of the Treasury, in that he desires the Court to be fully apprised of all relevant facts.

The conflict is, therefore, not between the governments of the United States and Germany or even between a department of the Government of the United States and a private litigant: *it is solely between adverse claimants to a special fund created by an act of Congress.*

Whether the sabotage claimants are entitled to deplete the special fund at the expense of the Old Award Holders involves the question whether their alleged awards were such as were contemplated by the Act of 1928 which in turn includes the questions whether the Mixed Claims Commission, United States *and* Germany, as established and limited by the 1922 agreement, upon the basis of which the 1928 Statute was enacted, had power to reopen its decision once made dismissing the claims, and the further question whether the Umpire and the American Commissioner, after the German Commissioner had resigned, had power to function as such Commission, and grant awards at all, or to grant them when the only question pending before them was whether a rehearing should be granted, the measure of damages not having been determined.

Petitioners contend that no award exists in favor of the sabotage claimants such as to entitle them to payment from the Special Deposit Fund under the Settlement of War Claims Act of 1928, because the alleged awards made by the Umpire (Honorable Owen J. Roberts) and the

American Commissioner (Honorable Christopher B. Garnett) were not awards by the Mixed Claims Commission, United States and Germany. (The reasons are elaborated at pp. 18-19, *infra.*)

History of Commission.

The Mixed Claims Commission, United States and Germany, was established pursuant to the Treaty of Berlin, dated August 25, 1921 (42 Stat. 1939). This Treaty ended the war between the United States and Germany and reserved for future settlement all claims of American nationals against the German Government.

To insure the payment of said claims, the American Government was permitted by virtue of the Treaty of Berlin to retain possession of all sequestered property until Germany made suitable provision for the satisfaction of American claims.

Pursuant to the provisions of the Treaty of Berlin and of the terms of the agreement annexed to the complaint, the Mixed Claims Commission was established to adjudicate the claims of American nationals.

Thereafter, an American and a German Commissioner, constituting the Commission, were appointed by their respective governments and, with the consent of both governments an American Umpire was chosen (R. 80, 223).

Act of Congress Providing for Payment of Awards.

In 1928 the Settlement of War Claims Act was passed by Congress creating by Section 4 thereof a special deposit account out of which in compliance with Section 2(b) of said act the Secretary of the Treasury was authorized and directed to pay an amount equal to the awards granted by the Mixed Claims Commission.

Dismissals of Sabotage Claims.

Prior to 1930, the sabotage claimants filed numerous claims, including claims of Lehigh Valley Railroad Company, Bethlehem Steel Corporation and Agency of Canadian Car & Foundry Company, Ltd. (R. 82, 223). These claims were dismissed:

First, October 16, 1930, upon the original hearing (R. 224, 260).

Second, March 30, 1931, upon application for rehearing (R. 225). No evidence was filed with this application for rehearing.

Third, December 3, 1932, upon second application for rehearing (R. 225).

In dismissing the first petitions for rehearing, the Umpire expressly pointed out that, although the *rules of procedure made no provision for rehearing*, said petitions had been carefully considered and were dismissed (R. 225).

In dismissing the second application for rehearing, the Umpire,* after a certificate of disagreement by both National Commissioners had been presented to him, found it unnecessary to pass upon the Commission's jurisdiction to grant a rehearing, stating that the conclusions reached made it unnecessary to pass upon that question (R. 227).

Petition of May 4, 1933 for Reopening and Rehearing.

The third petition for rehearing filed May 4, 1933, prayed for (R. 228):

> "reopening and rehearing of the decisions in these claims; the United States reserving the right to complete the evidence", etc.

* In this decision of December 3, 1932, Umpire Roberts found that claimants' evidence had been "prepared for the purpose of the case" (Dec. & Op. 1010).

Thus, the sole relief asked for in this petition was "reopening and rehearing of the decisions in these claims" (R. 228).

The German Government promptly protested to our State Department by letter dated October 11th, 1933, on the ground that the Commission had become *functus officio* when it decided the case (R. 249).

The State Department, however, in answer thereto stated that the question whether the Commission had jurisdiction to entertain a petition for rehearing was one properly to be decided by the Commission itself (R. 229).

Thereafter, two opinions in favor of reopening having been submitted by the American Commissioner, and two opinions by the German Commissioner in opposition, on December 15, 1933 Umpire Roberts, although ruling that the newly discovered evidence did not provide a basis for reopening, stated that the Commission had power to reopen in case the former decision was "induced by fraud" (R. 45, 229).

Pursuant to a special act of Congress passed in 1933, the American Agent subpoenaed a number of witnesses for examination, *in which examination the German Government did not participate, taking the position that the sabotage claims, after three dismissals thereof, could not properly be reopened* (R. 230).

Thereafter a motion for a bill of particulars of the charges of fraud was made by the German Agent and this motion was denied, Umpire Roberts saying:

> "The issue which will come before the Commission is made up by the allegations of the petition and the categorical denials of the answer" (R. 230),

thus indicating that the only issue was the issue of fraud.

Attempts to Dispose of the Claims on the Merits.

In 1935 the American Agent filed a motion for an order finally disposing of the claims on the merits, which motion was denied, Umpire Roberts saying:

> "By the petition and answer an issue was framed." (R. 231). * * * "Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening *vel non*, and not upon the merits * * *" (R. 234).

Upon an argument had before the Commission on June 3, 1936 Umpire Roberts again reiterated that the proceedings before the Commission remained strictly limited to the issue of fraud, stating as follows (R. 140):

> "Whether upon the showing made, the Commission should grant a rehearing, *unless Germany shall agree to a different course*, must, under the Commission's Decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits." (Italics ours.)

Germany never agreed to a different course (R. 233).

In said opinion thus limiting the issue, one of the dismissal decisions, that of December 3, 1932 was set aside, namely, the decision that if new evidence were formally placed before the Commission and considered in connection with the whole body of evidence, the findings and conclusions then reached would not be reversed or materially modified (R. 232).

There is no dispute, however, about the fact that this left the original decision of October 1930 in full force and effect, only subject to the granting of the motion then pending to *rehear* on the specific ground of fraud (R. 232).

The request that the Commission decide the merits of the sabotage claims was again made by the American Agent in his brief filed on September 13, 1938, but the German Agent in his brief filed in answer thereto on November 16, 1938 refused to consent to the course of procedure requested (R. 233).

The request was repeated on January 27, 1939 and again the German Agent refused the request (R. 235).

All the circumstances on the subject: whether Germany consented to a different course, are set forth in the answering affidavit (R. 233-235). The fact is that Germany never consented.

Retirement of the German Commissioner.

After extended argument in January 1939, the Commission met for the purpose of deliberating upon the application for rehearing (R. 235). During said deliberations, the German Commissioner retired.*

The agreement of 1922 under which the Mixed Claims Commission, United States and Germany had been created, had specifically provided for the possibility that one or the other of the Commissioners might "retire or be unable for any reason to discharge his functions" and contemplated that the work of the Commission,—being in its very nature "mixed",—might be arrested until the appointment of his successor.

Article II of said agreement provided (R. 16):

"The Government of the United States and the

* It is the claim of the American Commissioner and of the Umpire and of the respondent-intervener (R. 104) that, when the German Commissioner retired, there had been a disagreement as to the points at issue within the meaning of the agreement establishing the Commission. This allegation of fact is denied by the petitioner (R. 236), and the evidence in corroboration of this denial set forth at pages 58 *et seq.*, *infra*, clearly raised such an issue of fact as to prevent summary judgment for respondent-intervener.

> Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners *die or retire*, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him." (Italics ours.)

The American Commissioner and the Umpire, however, chose to disregard this specific provision of the agreement upon the ground that Germany "seeks to avoid a final conclusion and frustrate the work of the Commission" (R. 241) and proceeded at the hearing of June 15th, 1939 to further action although the German Commissioner had retired, the German Government had protested their jurisdiction and the Umpire proceeded to act without any written certificate signed by both Commissioners of their disagreement, a condition precedent to his power to make any award *in invitum* the German Government.

Fiat of June 15, 1939.

Although at that time there was nothing pending but a motion to reopen the original dismissal of the sabotage claims, the American Commissioner and Umpire proceeded not only to reopen the original dismissals but went further and granted awards in favor of the sabotage claimants with the final statement of the Umpire (R. 242):

> "* * * the Commission is prepared to sign awards, to be submitted by the American Agent, if approved by the Commission as to form."

This was done not only when nothing but a motion to reopen was pending but when there had been a specific

reservation that the question of the amount of the awards would in any event not be gone into until after the question of Germany's liability had been determined (R. 35, 84, 224, 243). The amount of the awards, moreover, was not a matter of *form* but of most complicated substance.

Protests by Germany.

On July 11, 1939, a letter was transmitted by the German Embassy to the State Department protesting against the proceedings, the Charge D'Affaires stating (R. 244):

> "It is patent that the ruling of the American Umpire relative to the entry of the awards as well as any award that might be signed by the Rump Commission consisting of the American Umpire and the American Commissioner, is null and void" (R. 244, 293).

In this letter he states that the German Government never signified its intention not to cooperate with the Commission (R. 292).

This letter was followed up by a letter of October 3, 1939, in which the principal grounds of protest are fully set forth (R. 195, 245 *et seq.*).

Reservation of Question of Damages.

Although there had been an express arrangement (Answer of respondent-intervener (R. 35), affidavit of Martin (R. 84), affidavit of Rogers (R. 224), reserving the question of damages to a later stage of the proceedings when Germany's liability should first have been established, the American Umpire, after alleged conferences with the American Commissioner, without counter-evidence submitted by the German Government, and without notice to

it, determined the amount of damages to each of the sabotage claimants and granted awards based upon such determination (R. 243).

Awards of October 30, 1939.

On October 30, 1939, the American Commissioner presented to the Umpire 153 awards to sabotage claimants totalling, with interest to January 1, 1928, a sum in excess of Thirty-one million Dollars ($31,000,000) (R. 63-73). These awards were filed with the Commission on that day (R. 108).

Awards to Non-American Nationals.

Even though the shares of stock of the Agency of the Canadian Car and Foundry Company, Ltd. were fully owned by a Canadian corporation (R. 254), on October 30, 1939, an award was granted to said company in the sum of $5,871,105.20 with interest at the rate of five per cent. (5%) from January 31, 1917 to date of payment (R. 181), which, with interest from January 31, 1917 to January 1, 1928, amounts to more than $8,750,000.

Awards were likewise granted to subrogee insurance companies (R. 258) without determining the extent of foreign ownership of the shares of said companies.

Petitioners Had No Standing before Commission.

Under Article VI of the Agreement of August 10, 1922, the only persons who had any standing befor the Commission were the two governments and their respective representatives. At no time were the old award holders permitted to appear before the Commission to protect their interests.

Protests by Petitioner, Z. & F. Assets Realization Corporation.

On June 23, 1939, there were sent to the Secretary of State and to the Secretary of the Treasury protests by petitioner, Z. & F. Assets Realization Corp. (R. 307-311) against the decision granting the awards and likewise before process was served herein, the Secretary of State and the Secretary of the Treasury were notified by letter dated the 25th day of October, 1939, that said petitioner would bring suit and ask for an injunction (R. 305, 306).

Specifications of Error.

The United States Court of Appeals erred in deciding:

First. That the respective rights of the petitioners and the defendant-intervener to receive payment from the special fund involved a political question not justiciable by the courts.

Second. That the certification of the awards by the Secretary of State precluded any judicial review.

Third. That, after the retirement of the German Commissioner, the Umpire and the American Commissioner were authorized to function as a commission and make awards.

Fourth. That the alleged awards are valid, in spite of the fact that, when the American Commissioner and the Umpire assumed to make them, the sole question before the Commission was whether there was such proof of fraud as justified a rehearing.

Fifth. That the Mixed Commission was empowered to grant rehearings of its award.

Sixth. That as, by the agreement between the United States and Germany, under which it was constituted, the Mixed Commission was authorized to adjudicate only the claims of United States citizens or nationals against Germany, it had power to make an award to the Agency of Canadian Car & Foundry Company, Ltd., whose stock was wholly owned by the parent Canadian company.

Seventh. That notwithstanding that issues of fact were involved, respondent-intervener's application for summary judgment was granted.

Summary of Argument.

I. The conflict of the respective claims of the old awardholders and the sabotage claimants to payment from the Special Deposit Fund is not political in the sense of depriving the courts of jurisdiction.

II. The certificate of the Secretary of State that awards were made is not conclusive as to the validity of the awards.

III. After the retirement of the German Commissioner, the Umpire and the American Commissioner were not authorized to function, and their so-called awards are not awards, but mere nullities.

IV. The alleged awards are mere nullities because, when the American Commissioner and the Umpire assumed the power to make them, the sole question before the Commission was whether there had been such fraud as might justify a rehearing.

V. Even if the Court should find that at the time of the retirement of the German Commissioner the Commis-

sion was properly functioning, then upon the retirement of the Commissioner according to the terms of the agreement of August 10, 1922, all proceedings were brought to a standstill until a new Commissioner was appointed. Assuming, however, that the Commission was properly functioning and was properly considering whether the previous decisions of the Mixed Claims Commission dismissing the sabotage claims should be reopened, and had properly decided that such decisions should be reopened, such decision of the Commission must be limited to the propriety of a rehearing, and all proceedings thereafter, namely, a hearing on the merits of said claims, and a decision on such merits, and the determination of the amount of damages must await the appointment of a new Commissioner.

VI. The decisions of the Mixed Claims Commission being final and binding even if properly constituted, it was not empowered to grant a rehearing.

VII. In accordance with the agreement of August 10, 1922, and in accordance with the ruling of the State Department, and in accordance with the previous decisions of the Commission that a corporation is only entitled to recover to the extent that its capital stock is American owned, and in view of the fact that the stock of the Agency of Canadian Car & Foundry Company, Ltd., was entirely Canadian owned, the Commission, even if properly constituted, had no jurisdiction to grant an award to the Agency of Canadian Car & Foundry Company, Ltd.

VIII. Since issues of fact were involved, respondent-intervener's application for summary judgment should have been denied.

I.

The conflict between the old award holders and the sabotage claimants as to their respective rights to payment from the special deposit fund is not a political controversy beyond the jurisdiction of the courts to determine.

Both the old award holders and the sabotage claimants assert their claims under Section 4 of the Settlement of War Claims Act. That Act provides for the payment, out of a special deposit fund, of proper awards of a properly constituted Mixed Claims Commission. It is conceded that if the alleged awards of the sabotage claimants are paid, the entire special deposit fund will be consumed, thereby depriving the old award holders of any payment on the balance of their claims.

The Court of Appeals, in holding that it had no jurisdiction to entertain the suit, based its decision solely on the assumption that this case turned on a purely political issue which the courts could not decide.

But where a conflict of property rights under statutes and treaties is presented, the determination of these rights by the Executive Department is subject to review by the courts (*Banco de Espana* v. *Federal Reserve Bank of New York*, 114 F. (2) 438, 442). The doctrine relied on by the Court of Appeals in this case has no application where, as here, the decision of property rights could not in any truly factual sense be deemed an interference with the conduct of our foreign relations by the Executive, nor a matter for the Executive exclusively to determine.

Willoughby, in his *Constitutional Law of the United States*, Second Edition, Section 855, page 1336, says:

> "When, however, private justiciable rights are involved in a suit, the court has indicated that it will

not refuse to assum isdiction even though questions of extreme political importance are also necessarily involved.

"Thus, as has been set forth in another chapter, [section 318] treaties entered into by the United States not only bind the United States internationally, but create municipal law for individuals so far as their personal rights and property are concerned. Thus a treaty having been entered into the court will follow its terms even when, by doing so, it has to go counter to the position previously assumed by the executive department, or, indeed, contended for by the government in the case at bar."

The same principle is recognized by the authorities and texts cited by Judge Miller in his opinion below.

Thus, Jaffe, *"Judicial Aspects of Foreign Relations"* says (233):

"Any matters relating to foreign affairs which under this logic would be 'political' are, in fact, handled by the courts. Courts determine whether a claim of sovereign immunity is properly asserted; they interpret treaties; they determine whether Orders in Council relating to prizes are in conformity with international law; they delimit and apply the duties of neutrality. They may do these things in the absence of relevant executive action, thus running the risk of future conflict and contradiction; they may do it in the face of executive action already taken."

Among the cases to which Jaffe referred are the following instances where the federal courts refused to follow the action of the Executive, where treaty rights were involved:

The Florence H., 248 F. 1012 (S. D. N. Y.);
United States v. *Watts*, 8 Sawyer 370 (D. Cal. 1882);

United States v. *Rauscher*, 119 U. S. 407;
Tartar Chemical Co. v. *United States*, 116 F. 726 (C. C. S. D. N. Y.).

Potter, in his article referred to by Judge Miller, "*The 'Political Question' in International Law in the Courts of the United States*" (8 Southwestern Political and Social Science Quarterly 127, 137), said:

> "* * * courts have, on several occasions, when asked to refrain from passing upon a given question, on the ground that it was political in character declined to accede to such a request * * *. Thus the courts have long since insisted upon their rights to take up a treaty directly and enforce it without any intervention from the political departments (*United States* v. *The Peggy*, 1 Cr. 103). Again they have insisted upon their rights to interpret treaties where interpretation is needed (*United States* v. *Rauscher*, 119 U. S. 407. In one case the Supreme Court denied *obiter* any obligation to accept interpretations imposed by the political department where private rights are involved: *Charlton* v. *Kelly*, 229 U. S. 447). And finally they have insisted upon applying customary international law in a few cases so as to scrutinize the acts of national administrative authorities and overrule them if need be—in cases involving jurisdiction over alien vessels or persons in port, and in cases of attempted extradition * * * (*Wildenhus's Case*, 120 U. S. 1; *United States* v. *Rauscher*, 119 U. S. 407)."

Similarly, in the *Head Money Cases*, 112 U. S. 580, 598, 599, cited in the opinion below, it is stated:

> "But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits

of the other, which partake of the nature of municipal law, and which are capable of enforcement, as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land'. A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

The same argument was made by the Government in the case of *Deutsche Bank* v. *Cummings*, 83 F. (2d) 554—that the Court did not have jurisdiction to protect the rights of the plaintiff, a former German enemy alien, whose property was sequestrated and who sought the return thereof after an attachment levied on the property had been vacated. Judge Groner there made the following comments as to the case of *Chae Chan Ping* v. *U. S.*, 130 U. S. 581, 9 S. Ct. 623, cited by the Government for the proposition that the rights of the plaintiff in that case were political and, therefore, not the subject of a justiciable controversy (p. 563):

"* * * the Supreme Court was at pains to point out the difference between rights of a political nature

and rights involving property. As to the latter, the Supreme Court said: 'The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property capable of sale and transfer, or other disposition. * * *.'"

This Court, refusing to dismiss the *Deutsche Bank* case, 300 U. S. 115, for want of jurisdiction, reversed the decision of the Court of Appeals of the District of Columbia on other grounds.

In *Banco de Espana* v. *Federal Reserve Bank of New York* (114 F. 2d at 442), Judge Clark said:

"We do not believe the acts of Secretary Morgenthau in accepting the representations of the Spanish Ambassador are binding upon the courts on a controversy as to the validity of a purchase of property by the United States which does not affect the international or diplomatic relations of our government, but turns rather on the effect of local law on the vendor's title. The courts will leave for the Executive the determination of all 'political' issues; in the international field this means such matters as the recognition of new governments or the making of treaties, not the direct determination of questions of property. *Cf. Doe ex dem Clark* v. *Braden*, 16 How. 635, 57 U. S. 635, 14 L. Ed. 1090; *Z. & F. Assets Realization Corp.* v. *Hull et al.*, ... App. D. C. ..., ... F. 2d ...,* June 3, 1940; Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. Rev. 485; Jaffe, Judicial Aspects of Foreign Relations (1933) 8-78. The decisions investigating the title to the Spanish vessel 'The Navemar' are per-

* Not released by court at date of publication but since reported (114 F. 2d 464).

haps not controlling, since there the Executive Department refused to take a position. *Compania Espanola* v. *The Navemar,* 303 U. S. 68, 58 S. Ct. 432, 82 L. Ed. 667, reversing *The Navemar,* 2 Cir., 90 F. 2d 673; *The Navemar,* 2 Cir., 102 F. 2d 444. But other recent decisions, particularly those concerning the assignment by Soviet Russia of all its claims against American nationals to the United States, indicate that the validity of the title acquired is subject to judicial inquiry. *United States* v. *Bank of New York,* 296 U. S. 463, 480, 56 S. Ct. 343, 80 L. Ed. 331; *United States* v. *Belmont,* 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 58 S. Ct. 785, 82 L. Ed. 1224; *United States* v. *Moscow Fire Ins. Co.,* 60 S. Ct. 706, 725, 84 L. Ed. ..., affirming *Moscow Fire Ins. Co.* v. *Bank of New York & Trust Co.,* 280 N. Y. 286, 20 N. E. 2d 758, by an equally divided court; 47 Yale L. J. 292; 49 ibid. 324; 51 Harv. L. Rev. 162; 31 Am. J. Int. L. 481, 675; 5 U. of Chi. L. Rev. 280. A broader interpretation of 'political' questions is unnecessary to the effective conduct of diplomatic relations with other countries and is undesirable as subjecting issues of private property to the changing circumstances of international politics beyond what is inevitable in any event."

The doctrine of non-justiciability (judicial self-limitation, as it is sometimes called), had its origin in "matters that required no subtlety to be identified as political issues" (*Coleman* v. *Miller,* 307 U. S. 433, at 460).

> "The origin and existence of a State, the existence and justice of a war, or the validity of a revolutionary change in the form of government, are all of them questions which no nation ever allowed Courts to determine" (3 Warren: The Supreme Court in United States History 185).

Accordingly, issues have been held non-justiciable involving the degree of proof requisite for the recognition of a foreign nation (*United States* v. *Palmer*, 3 Wheat. 610 [1818]; *Kennett* v. *Chambers*, 14 How. 38 [1852]); the extent of the boundaries of a foreign nation (*Foster & Elam* v. *Neilson*, 2 Pet. 253 [1829]); the properly constituted representatives of a foreign nation (*Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 137 [1938]); or the extent of the immunities which will be accorded such representatives (*Schooner Exchange* v. *M'Faddon*, 7 Cranch. 116 [1812]).

Similarly, jurisdiction has been declined as to the nature of obligations alleged to have been assumed by a new sovereign after a change of sovereignty by cession (*West Rand Central Gold Mining Company, Ltd.* v. *The King* [1905] 2 K. B. 391) or as to an alleged obligation of a sovereign to turn over to its subjects moneys collected on their behalf from another sovereign (*Rustomjee* v. *The Queen*, 1 Q. B. D. 487, 2 Q. B. D. 69 [1878]). Such issues were purely political since they sought to impose obligations on sovereignty *in invitum*.

Jurisdiction has likewise been declined over issues involving changes in the structure of government itself (*Duke of York's* case, 5 Rotuli Par. 375 [1460]; *Luther* v. *Borden*, 7 How. 1 [1849]; *Martin* v. *Mott*, 12 Wheat. 19 [1827]; *Pacific States Telephone Co.* v. *Oregon*, 223 U. S. 118 [1912]; *Davis* v. *Hildebrant*, 241 U. S. 565 [1916]; *Mountain Lumber Co.* v. *Washington*, 243 U. S. 219 [1917]), or relating to the degree of proof requisite for the recognition of a legislative act affecting the structure of government itself (*Field* v. *Clark*, 143 U. S. 649; *Coleman* v. *Miller*, 307 U. S. 433).

Finally, it required no subtlety to identify as purely political the question of whether Great Britain, by new acts of hostility, had so broken the Treaty of Peace of

1783 as to make its provisions no longer binding on the courts of the United States (*Ware* v. *Hylton*, 3 Dall. 199, 258-260), whether Italy had so broken an Extradition Treaty as to make its provisions no longer binding on the courts of the United States (*Charlton* v. *Kelly*, 229 U. S. 447, 476); whether Germany had impliedly repealed a Prussian-American Extradition Treaty by its adoption of the Constitution for the German Empire, where the "judgment of *both* governments" was "to the contrary" (*Terlinden* v. *Ames*, 184 U. S. 270, 290). The questions were political in their very essence, since only the Executive or the Congress could repudiate a treaty or declare it no longer binding on the United States.

Other authorities upon which respondents rely are distinguishable as involving a purely political question which can be determined only by the executive or legislative branch of the Government. In view of the well known principle of law, that an Act of Congress may validly repeal a prior and inconsistent treaty stipulation, it is for the executive branch of the Government to determine whether a treaty has been broken by the later Congressional Act or what remedy shall be given. To this effect see: *Whitney* v. *Robertson*, 124 U. S. 190; *George E. Warren Corporation* v. *United States*, 94 F. (2d) 597, cert. den. 304 U. S. 572; and *Botiller* v. *Dominguez*, 130 U. S. 238.

In these cases, the "political" question upon which the Court declined to pass was the *power of the Congress to pass a statute* claimed to be inconsistent with some privilege which the treaty-making branch had conferred upon some other nation by the President with the advice and consent of the Senate.

But here we ask merely for a declaration of private rights resulting from Congressional Act and Executive action. We are not asking a determination that the treaty is no longer binding.

Although respondents have, in deference to judicial decisions (*Comegys* v. *Vasse*, 1 Peters 193; *Frevall* v. *Bache*, 14 Peters 96; *Judson* v. *Corcoran*, 17 Howard 612), conceded that controversies relating to priorities of payment and the ownership of awards are not at all in the nature of political questions, they nevertheless contend that the question of the existence or the validity of what in name purports to be an award is somehow so inseparably connected with the conduct by the Executive of foreign relations as to preclude the courts from taking any action to assure to the claimants their actual legal rights. Such a contention is obviously inadmissible, unless it be assumed that the Executive is illegally impeded whenever the courts undertake to inquire into and determine the legality of his acts. It is plain that, in the present instance, neither the proper and lawful conduct of our foreign affairs, nor the proper and lawful conduct of our domestic affairs, would in any way be impeded by a judicial determination that the so-called awards now in question was the result either of a mistaken view of the law or the facts, or of a usurpation of power.

Such a determination would in no way embarrass the Executive in securing a proper determination, by arbitration or otherwise, of the sabotage claims; nor would it constitute more of an interference with executive conduct than the exercise by a court of the concededly judicial function of deciding that an award was made to the wrong person, or that the wrong person had made an award, or that an arbitrator or umpire had made a mistake as to the extent of his powers. Nor could a reversal of the judgment of the court below in the present case constitute in any sense an improper interference with the power of the Executive to conduct foreign affairs.

II.

The certificate of the Secretary of State certifying awards is a ministerial act and not conclusive of the validity of an award.

(a) *Petitioners have a property right in the Special Deposit Fund and are entitled to bring the action.*

By the Settlement of War Claims Act of 1928 (45 Stat. 254), Section 2 (b), the Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of the petitioners' awards, as certified pursuant to Section 2 (a) of said Act. These payments are to be made out of the German Special Deposit Account created by Section 4 of the Act in the order of priority provided in Section 4 (c).

The right to receive payments provided for by Congress is a property right passing to the estate in bankruptcy of the claimant.

Williams v. *Heard*, 140 U. S. 529;
Comegys v. *Vasse*, 1 Peters 193.

The Special Deposit Fund is a fund which is the property of the United States, but by Section 4 of the Settlement of War Claims Act, that fund has been appropriated by Congress for the benefit of persons having bona fide awards.

Under the authority of *Houston* v. *Ormes*, 252 U. S. 469, where a fund has been appropriated by Congress for payment to a specified person, the Treasury officials are charged with the administrative duty to make payments on demand to the person designated and are therefore subject to mandamus.

To the same effect:

Parish v. *MacVeagh*, 214 U. S. 124.

This Special Deposit Fund consists of 20% of the German property seized during the war, unallocated interest thereon, the specific appropriation by Congress of more than $86,000,000 and the moneys received under the Paris agreement of January 14, 1925 and under the German-American debt agreement of June 23, 1930 (Report of Secretary of Treasury, June 30, 1939, p. 76). Consequently, this action comes squarely within the cases holding that, where Congress has made an appropriation for certain persons, those persons may resort to the courts for the enforcement of their right of payment. It is utterly immaterial that these were moneys of the United States. As soon as an appropriation is made, until that appropriation is withdrawn, the direct beneficiaries of such appropriation have rights which may be protected in the courts from improper attack.

In the case of

American-Mexican Claims Bureau v. *Morgenthau*, 26 F. Supp. 904, 906,

in referring to moneys appropriated by Congress for the payment of awards of the Special Mixed Claims Commission, the Court said:

> "Under the circumstances here disclosed the money paid into the Treasury of the United States by the Government of Mexico is a trust fund. The beneficiaries of that fund are those claimants who have received awards at the hands of the Special Mexican Claims Commission. The Secretary of State and the Secretary of the Treasury are designated to ad-

minister the fund. The Government of the United States has no claim to it and makes none. Regardless of the outcome of this litigation, the Government will receive none of the fund."

In the opinion of the District Court it is asserted that the claims of the petitioners are claims of the United States, and that the question whether the claims "were properly allowed or not was a question to be raised by the United States and not by individuals who might be wronged by the action of the commission." The learned Justice goes on to say that if there was "any breach of the treaty between the two governments the only recourse would be by action of the contracting parties." For this contention there might be some show of reason, if the money had to be paid on the awards by the one government to the other. But here, as the money was in the possession of the United States, the real question in the present case is one between two classes of American nationals, one of which seeks to take from the other the moneys that had been awarded to it held in the Treasury of the United States.

It is contended by the respondents that the claims of the award holders are claims that belong to the United States and that the United States is solely responsible for their espousal, and that therefore petitioners are not in position to question any act of the Department of State in connection with the claim.

On this subject Umpire Parker in Administrative Decision V said as follows:

"The Umpire agrees with the American Commissioner that the *control* of the United States over claims espoused by it before this Commission is complete. But the generally accepted theory formulated by Vattel, which makes the injury to the national an injury to the nation and internationally therefore the

> claim a national claim which may and should be espoused by the nation injured, *must not be permitted to obscure the realities or blind us to the fact that the ultimate object of asserting the claim is to provide reparation for the private claimant,* whose rights have at every step been zealously safeguarded by the United States and who under the Treaty of Berlin is entitled through his Government to receive compensation. Both that Treaty and the Agreement constituting this Commission clearly distinguish throughout between government-owned claims and privately-owned claims. Internationally the distinction is important in determining Germany's obligations under the Treaty of Berlin as illustrated by the decision of this Commission in its opinion construing the phrase 'naval and military works or materials' where it was held that 'So long as a ship is privately operated for private profit she cannot be impressed with a military character, for only the Government can lawfully engage in direct warlike activities.'" (Italics ours.) (Dec. & Op., p. 192.)

This statement was made in the course of aforesaid Administrative Decision dated October 31, 1924, which holds that with respect to Germany's obligations and the jurisdiction of the Commission, no awards shall be granted to the extent that the beneficial interest in the claim is non-American.

In the *Matter of Westbrook*, 228 App. Div. 549, the Court said (p. 550):

> "The situation is aptly summed up in Thorpe on International Claims, 1924. As there stated, while the parties to a litigation in an arbitrable tribunal, such as the Mixed Claims Commission, are the sovereign parties to the treaty, such sovereign parties conduct the litigation on behalf of their respective

citizens and the real owners of the claims, and the real parties in interest are the respective citizens (pp. 59, 60)."

Consequently, there is no basis for the contention that the real party in interest is the United States Government and that, therefore, petitioners had no standing to bring this action.

(b) *In view of petitioners' property right, the District Court had jurisdiction to grant a declaratory judgment protecting the petitioners from payment of awards that were mere nullities.*

In *Perkins* v. *Elg*, 307 U. S. 325, suit was brought in the District Court of the District of Columbia for a declaratory judgment. The suit was brought against the Secretary of Labor, the Acting Commissioner of Immigration, and the Secretary of State, for a declaration that the plaintiff was a citizen of the United States entitled to a passport.

The Supreme Court of the United States, while affirming the judgment of the courts below that the issuance of a passport was within the discretion of the Secretary of State, modified the judgment by including the Secretary of State in that part of it which held the plaintiff to be a citizen of the United States.

This case is clear authority for the proposition that if, as a matter of law, the sabotage awards are invalid and void, the petitioner is entitled here as against the Secretary of State to a judgment to that effect.

Furthermore, this Court has held that where an international tribunal exceeds its power, the Municipal Court is privileged to adjudicate to that effect.

Vol. VII *Moore, Digest*, §1072, page 30.

In *Comegys* v. *Vasse*, 1 Peters 193, Justice Story held that to the extent that a commission acted within its

jurisdiction, its decisions were final and conclusive; but in so far as it decides in matters beyond its jurisdiction, its acts were not final and conclusive but were subject to review by the municipal courts.

In *Standard Marine Ins. Co.* v. *Westchester Ins. Co.*, 19 Fed. Supp. 334, affirmed 93 Fed. (2d) 286, cert. denied 303 U. S. 661, Judge Knox, referring to the fact that the Supreme Court, in the *Comegys* case, had held that the award of the Commissioners did not bar an action to review the acts of the Commissioners, in so far as they exceeded their jurisdiction, stated (p. 338):

> "If the decision of the Florida commission were conclusive against Vasse, the Supreme Court would not have gone into the merits of his claim. However, it proceeded to do so."

To the same effect see:

Frevall v. *Bache*, 14 Peters 95.

(c) *Congress did not intend that the certificate of the Secretary of State should be regarded as a judicial act foreclosing inquiry by the courts.*

The District Court held that under Section 2 of the Act of Congress, the legality of disbursements from the special deposit fund is exclusively determinable by the Secretary of State and that his certificate is conclusive.

Section 2 of the Settlement of War Claims Act of 1928 provides:

> "(a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission * * *.
>
> (b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified * * *."

Clause (a) means merely that the Secretary of State shall certify the award as a genuine document. The contention now made that his certification attests it in any other sense is altogether singular and heretofore unheard of. The Secretary of State neither reads the evidence nor hears the arguments of counsel upon it. In no sense, therefore, can his act preclude subsequent inquiry as to the validity of the award, either nationally or internationally. In enacting clauses (a) and (b), the Congress had in mind solely the fact that an award had been made. It had no thought of precluding inquiry, judicial or otherwise, as to the validity of awards, and least of all as to whether a document called an award was in reality an award of the Mixed Commission set up to give effect to the Treaty and the Act of Congress.

While the agreement of August 10, 1922, under which the Mixed Claims Commission was appointed, was effected by an exchange of notes, its object, as expressly declared in its preamble, was to determine "the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded by the two Governments on August 25, 1921, which secures to the United States and *its nationals* rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles." (Italics ours.)

From this it logically follows that as treaties are, by the express terms of the Constitution, "the supreme law of the land", and as such are interpreted and enforced by the courts, the exercise of this power may be invoked by individuals for the assurance of their rights, and particularly those of a financial kind.

> "The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to

settle the rights under a treaty, or to affect titles already granted by the treaty itself."

Jones v. *Meehan*, 175 U. S. 1, 32.

In answer to a protest by the Spanish minister, in 1842, against the exercise by the courts in the United States of the right to interpret and give effect to treaties affecting titles to land, Daniel Webster, who was then Secretary of State, replied that, "in all regular governments, questions of private right, arising under treaty stipulations, are in their nature judicial questions" and that this was particularly the case in the United States, where "a treaty is part of the supreme law of the land," and as such "influences and controls the decisions of all tribunals."

Webster's Works, VI, 399, 400.

The question whether the Congress could have provided for the payment of any claim which the Secretary of State might find to be justified, we are not called upon to discuss; but, if Congress had so intended, it would certainly have provided for the hearing of the parties by the officer entrusted with the determination, as is usual where the administrative determination of matters affecting private rights is intended.

The petitioner's position is that, by the above quoted language, the Congress merely intended that the Secretary of State should authenticate the fact that an award had been made (in the same sense that a Notary Public authenticates the signature of the grantor), but that it never intended to vest in the Secretary of State the power to decide whether the authenticated award had been validly made or was in excess of the powers of the Commission itself. In other words, he is not called upon to examine the evidence or their jurisdiction and to affirm

or revise the awards which he certifies to the Secretary of the Treasury. In fact, the Secretary of State in this case acted within a few hours (R. 302, 312, 318), so had no time to make any judicial inquiry, which he must have assumed was not called for.

The District Court's holding that the Secretary's certificate was conclusive amounts in substance to a claim that the Congressional direction to the Secretary to certify awards was intended to give him the sole and exclusive right to determine the existence and validity of any award made or alleged to have been made by the Commission. If the Congressional intent was to make the Secretary's certificate conclusive, there is as much reason to suppose that such a certificate would be conclusive as to the person in whose favor the award was made, as it would be as to the validity of the award itself.

The logical conclusion of such an interpretation would be to give the Secretary the right to issue a conclusive certificate as to an award in favor of the wrong claimant or an alleged award which had never in fact been made by the Commission. The Secretary's certificate would be conclusive as to the validity of an award even though it had admittedly been forged by a clerk in the office of the American agent of the Commission or made in favor of a German national.

The mere statement of such a possibility tends to negative any inference of Congressional intent to endow the Secretary with any powers so broad.

Whenever the executive determination has been held conclusive in the absence of a statutory provision for a hearing and determination, the statute has either *expressly* provided for finality (*United States* v. *Babcock*, 250 U. S. 328, 331), or the character of the executive determination was such as to admit of no doubt that discretion had *necessarily* been conferred. "To perform that

task, power discretionary in character was necessarily conferred" (*Williamsport Co.* v. *United States*, 277 U. S. 551, 559). In each case it could fairly be presumed that the Congress had envisaged the likelihood of and necessity for the exercise of executive discretion and the pressing need for executive finality. And where the executive determination includes a finding as to its own jurisdiction, it has generally been assumed that the statute must provide for *some* method of review (*Newport News Co.* v. *Schauffler*, 303 U. S. 54, 57; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41 at 50).

Adams v. *Nagle*, 303 U. S. 532, is a recent illustration of the circumstances under which executive finality is enforced *in the first instance*. There the Comptroller's power to determine the necessity for an assessment on bank shares was held necessarily to have conferred discretion to determine "the availability and value of the assets * * * to answer the claims of creditors", and the remote possibility that the assessment might prove excessive and that subsequent reimbursement might be delayed, was more than counterbalanced by the imperative need for prompt action.

Here, however, there was no necessary inference that discretion had been delegated to the Secretary of State, and no imperative need for prompt action by the Secretary on the basis of his determination. In fact, he "determined" nothing except that the document in front of him looked like an award of the Commission.

The functions of the Secretary of State with respect to the fund begin and end with certification; decision was lodged with the Commission, payment with the Secretary of the Treasury. Certification was no more than a vehicle of notification to the Secretary of the Treasury that the Commission had signed, sealed and entered its alleged decision. True, the Secretary of State might

choose to take further diplomatic action if the action of the Commission were unsatisfactory to him (either on moral grounds or for palpable excess of power); but such action would in no sense spring from the Act of Congress, and hence could not enlarge the ministerial quality of his function under the statute.

We submit that the Congress of 1928 would have been surprised if anyone had then suggested that they were making provision for payment at the discretion of the Secretary of State.

If the Secretary of State has by the Statute been vested with the sole power to control disbursements of moneys out of the Special Deposit Account, he has been vested with a power unusual in the extreme, and far removed from the normal functions of his office (*cf. Dismuke* v. *United States*, 297 U. S. 167, 172).

In construing a kindred statute providing for the issuance of a certificate by the Secretary of State, such certificate has been adjudicated by the courts to be merely a ministerial act and not conclusive. Thus, in the case of *Orinoco* v. *Orinoco Iron Co.*, 296 Fed. 965, 54 App. D. C. 218, the Orinoco Company, Ltd., hereafter called "Limited Company", had made, through the United States Government, a claim against Venezuela for indemnity because of her illegal annulment of a certain concession, which concession had vested in the Orinoco Company, Ltd. The appellee, the Orinoco Iron Company was the lessee from the Limited Company of mining rights and had expended $175,000 in exploiting and operating the mines, when the Limited Company was thus ousted. By virtue of the Act of February 27, 1896, Chapter 34 (31 U. S. C. 547); all monies received by the Secretary of State from foreign governments and other sources, must be deposited in the Treasury. According to this Act, the Secretary of State is required to determine the amounts due claim-

ants, and certify the same to the Secretary of the Treasury, who must, upon presentation of the certificates of the Secretary of State, pay the amount so found due.

After the payment was made into the Treasury of the United States, a controversy arose between the receiver of the Limited Company and the Orinoco Iron Company as to who was entitled to the fund and the latter sought to have the payment made to it on the ground that the Limited Company, not having suffered the loss, was not the owner of the claim. The Secretary of State refused to recognize the claim of the Orinoco Iron Company and directed the payment of the money to the Limited Company and to other persons designated by it, and sent certificates to the Secretary of the Treasury for such distribution.

The Court of Appeals of the District of Columbia sustained the claim of the appellee, holding that the certificate of the Secretary of State did not interfere with the power of the court to declare the appellee entitled to an equitable lien on the fund and overruled the contention of the Secretary of the Treasury that his duty was merely ministerial and that he must carry out the certificate of the Secretary of State. The dissenting opinion states that the Secretary of the Treasury could not be enjoined from carrying out the determination which the Secretary of State was vested with final and exclusive power to make, especially as the Secretary of the Treasury was directed by the statute to make payment in accordance with that determination. In fact, the dissenting Judge said:

> "If the Secretary of the Treasury may be enjoined from paying the moneys to the beneficiaries, it is not apparent why mandamus would not lie to compel payment to the plaintiff." (p. 226)

He went further and stated as follows:

> "Indeed, if it be true that the Secretary of the Treasury can be enjoined from making the payments directed by the Secretary of State, then, as a corollary of that proposition, it would seem that the findings of the Secretary of State may be controlled and directed by the judicial department of the government,". (p. 226)

The majority of that court did not agree with his contention, and the holding of the majority was affirmed by the United States Supreme Court in *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121.

The statute in the *Orinoco* case seemed possibly to authorize the Secretary of State in his discretion to determine the amounts due claimants respectively from each of such trust funds (to wit, the trust funds represented by monies received from foreign governments).

In the present statute, no such discretion is vested in the Secretary. When he receives from the Commission copies of the awards, it is his duty to certify the same without further question and, therefore, as held in *Perkins* v. *Elg* (307 U. S. 325), he is subject to a declaratory judgment as to the rights of the various claimants to the Special Deposit Fund.

That the Secretary of State in certifying was performing a purely ministerial function, is demonstrated by the fact that he is frequently called upon to certify to the Treasury Department international awards. A recent example occurred in the case of the creation of a commission under the Convention between the Mexican Government and the United States Government in relation to claims of American citizens against the Mexican

Government (*American-Mexican Claim Bureau* v. *Morgenthau*, 26 Fed. Supp. 904).

As appears from that case, Congress passed an Act "relative to determination and payment of certain claims against the Government of Mexico" in Section 4 of which Act (50 Stat. 783, c. 758), it was provided that "upon the certification to the Secretary of the Treasury of the awards of the Special Mexican Claims Commission, he shall proceed to make payments as provided for in section 9 of the Act approved April 10, 1935."

By the last mentioned Act (Act of April 10, 1935, 49 Stat. 149, c. 55), the Commission was required to report to the Secretary of State "a list of all claims allowed in whole or in part, together with the amount of each claim and the amount awarded by the Commission". The Secretary of State in turn was "required to transmit a certified copy of the list of claims allowed to the Secretary of the Treasury".

Certainly, the certification of a list is nothing but a ministerial act and not the performance of a judicial function. Consequently, it follows that when the language of a statute such as in the case before the court requires certification on the part of the Secretary of State, it should not be deemed the performance of a judicial function unless special language is used to indicate that such was the intention.

(d) *A fortiori is such a certificate not controlling when made with knowledge of contemplated resort to the courts and after actual filing of the bill.*

It is claimed by the respondents that because the Secretary of State certified the awards to the Treasury Department before he was actually served with process, the suit had become moot as to him. This contention was sus-

tained by the District Court. In other words, the respondents claim that because the Legal Adviser to the Secretary of State frustrated attempts to serve the complaint until after the certificates were actually signed (R. 318), petitioners lost their right. The complaint was filed at 9:05 A. M. on October 31, 1939 (R. 302), served upon the Secretary of Treasury at about 9:35 A. M. and upon the Legal Adviser to the Secretary of State at 3:15 P. M. on that day (R. 302, 332). Prior to the service upon said Legal Adviser, the Marshal attempted to serve process and was advised to return the next day, but ignoring such advice, he succeeded in effecting service in the afternoon of the same day (see Affidavit of Administrative Assistant, Legal Adviser's Office, Department of State, R. 318). In the meantime, between 9:05 A. M. and 3:15 P. M. these awards, 153 in number, were certified (R. 318).

In view of the fact that the Department of State was on June 23rd and October 25th, 1939 duly notified of the intention of the petitioners to bring the suit (R. 303-317), this evasion of service of process on the part of the Department of State (R. 318) does not deprive the petitioners of their rights.

If their suit is meritorious, the petitioners are entitled to have the *status quo* restored as of the time of the commencement of the action (*Texas & N. O. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475). There Mr. Justice Brandeis said (at p. 479):

> "For where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by mandatory injunction, compel a restoration of the *status quo*. *Tucker* v. *Howard*, 128 Mass. 361, 363; *Town of Plattebille* v. *Galena & Southern Wisconsin R. R. Co.*, 43 Wisc. 493, 506-507."

An action is commenced by the filing of the complaint (Federal Rules of Civil Procedure, Rule 3). Therefore, the statement that the service of process was "too late" is completely unjustified.

The very speed with which the awards were certified indicates that the Secretary of State was not exercising a judicial function.

III.

The Commission made no awards in favor of the sabotage claimants, because, after the retirement of the German Commissioner, the Commission no longer existed.

The Commission made no awards in favor of the sabotage claimants, because, after the retirement of the German Commissioner, the Umpire and the American Commissioner were not authorized to function, and their so-called awards were nullities. This follows the principles of international law, the terms of the agreement creating the Commission, and the rules adopted by the Commission.

(*a*) *The awards were nullities under international law.*

While a private party's withdrawal at will from an arbitration was recognized at common law (*Russell on Arbitration & Award,* 43; *People ex rel. The Union Ins. Co. of Philadelphia* v. *Nash,* 111 N. Y. 310). Statutes have, on the ground of domestic public policy, since taken away the right (*Sturges, Commercial Arbitrations and Awards* (1930) §33). But no such change has taken place as to international tribunals, the parties to which are sovereign powers; and the power to withdraw has always been recognized.

To the student of international affairs and the science of government, adherence to this principle has always seemed highly desirable since the effect of an award *in invitum* may be likely to aggravate the relations between otherwise friendly governments and serve no useful purpose.

(*b*) *Under the terms of the agreement.*

The power of a Commissioner to resign, and the procedure to be followed in that contingency, are provided by the terms of the agreement between the two Governments.

The agreement creating this Commission was made pursuant to the Treaty of Berlin which provided that the United States should have "the rights and advantages stipulated" in Part X of the Treaty of Versailles (42 Stat., par. 2, p. 1939), which in turn provided for the creation of "Mixed Arbitral Tribunals" (Part X, Article 304). This means that the tribunal was to consist of at least one national of each of the High Contracting Parties, Germany and the United States, so that, if one of the Commissioners resigns, the tribunal can no longer function, and especially must this be so when, as in this case, the remaining Commissioner and the Umpire were both Americans.

That it never was contemplated that the Commissioner of one of the Governments and the Umpire, no matter what his nationality might be, could be considered as the Mixed Commission is apparent not only from the treaty but from the terms of the agreement negotiated pursuant thereto. Article II of the agreement creating the Commission provides:

> "The Government of the United States and the Government of Germany shall each appoint one com-

missioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him" (Appendix, p. ii).

The very instrument which created the Commission therefore contemplated the actual participation of a Commissioner appointed by each Government as an essential condition of the performance of its mandate and above all of the making of awards.

The power to arrest the further functioning of a commission so constituted is well recognized. With respect to a Mixed Commission sitting under the Jay treaty, Judge Moore says:

"A controversy arose in the proceedings of the London commission under Article VII of the Jay treaty as to the power of the commission to decide whether it possessed jurisdiction of claims on which a final decision had been rendered by the lords commissioners of appeal—the highest court of appeals in prize cases. In order to prevent the commission from acting on this question, the British commissioners asserted a right to withdraw from the board, the treaty requiring at least one of the commissioners on each side and the fifth commissioner to be present at the performance of any act appertaining to the commission. In this way the progress of the board was brought to a halt." (VII Moore, Digest 33.)

Similarly, the Mixed Arbitral Tribunal of Hungary and Roumania ceased to function when Roumania or-

dered its national judge to withdraw from that Commission (*Collection of Opinions, Articles and Reports bearing upon the Treaty of Trianon*, etc., Vol. II, by Dr. Vallotton of Lausanne, a member of the "Institut de Droit International" and former President of the American-Norwegian Mixed Arbitral Tribunal, p. 231).

(c) *Under the rules adopted by the Commission.*

With the consent of both Governments, the Commission adopted rules of procedure.

Under the rules so adopted and still unaltered at the time of the retirement of the German Commissioner, the Umpire could act only upon *written* certification by *both* Commissioners that they were in disagreement. Article VIII, subd. (a) of the Rule VIII of the Commission provides:

> "(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified" (Appendix, p. v).

A similar provision in an international arbitration agreement was held to be mandatory on the tribunal. Thus, where arbitrators in a certain arbitration with Spain differed, and sought the opinion of the Umpire, Count Lewenhaupt, as to the meaning of Article I providing that the Umpire "shall decide all questions upon which they shall be unable to agree", he held:

> "The functions of the umpire are limited by Article I of the agreement to the decision of questions upon

which the arbitrators are unable to agree, and which they submit to him for decision. * * *

"'* * * if one of the arbitrators refuses to certify the disagreement, the case cannot again come before the umpire under the agreement of 1871'" (3 *Moore, Arbitrations* 2192).

But in the present case there was even a greater limitation on the powers of the Umpire. He could decide on matters about which the Commissioners were in disagreement only after such disagreement had been certified to him in writing.

The awards of the Commission, as demonstrated by its Report of Opinions and Decisions, show that many decisions and awards were granted by the two Commissioners without calling in the Umpire by a certification of disagreement. Therefore, the conduct of the Commission demonstrates beyond a doubt that the agreement between United States and Germany did not create a commission of three persons, but a commission of two, with authority on the part of the Umpire to function only in case of disagreement.

In the *Greco-Turkish Agreement of December 1, 1926* (Permanent Court of International Justice Advisory Opinion No. 16 (August 28, 1928), Public Ser. B., No. 16, pp. 20, 21), the following clause appears:

"Article IV.—'Any questions of principle of importance which may arise in the Mixed Commission in connection with the new duties entrusted to it by the Agreement signed this day and which, when that Agreement was concluded, it was not already discharging in virtue of previous instruments defining its power shall be submitted to the president of the Greco-Turkish Arbitral Tribunal sitting at Constantinople for arbitration. The arbitrator's awards shall be binding.'"

This clause gave rise to differences of interpretation regarding conditions for appeal to the arbitrator, and these differences were submitted to the Permanent Court of International Justice at The Hague for an advisory opinion. *The court held that while the two national commissioners could decide when questions of principle of importance arose, the president could act only when the two national commissioners decided that the matter was a question of principle.*

Applying this decision to the present case, it is obvious that the Umpire, in the event of disagreement, could function only after receiving a written certificate of disagreement signed by the Commissioners who essentially constituted the Mixed Claims Commission.

Subdivision (d) of rule VIII of the Rules reads as follows:

> "(d) All decisions shall be in writing and signed by (1) the Umpire and the two National Commissioners, or (2) by the two National Commissioners where they are in agreement, or (3) by the Umpire alone when the two National Commissioners have certified their disagreement to him. Such decisions need not state the grounds upon which they are based." (Appendix, p. 5.)

By the terms of this subdivision as well as by the terms of subdivision (a) (p. 47, *supra*), the Umpire may function "*alone*" only "when the two National Commissioners have certified their disagreement to him".

On March 20, 1929, special additional rules applicable to the sabotage cases were adopted by the Commission, one of which reads as follows:

> "The Umpire will sit with the National Commissioners throughout the argument."

This amendment does not modify or affect the rules earlier made by the Commission and certainly does not change the rules with regard to its decisions.

In 1931 the sabotage claimants objected to Umpire Boyden joining with the two National Commissioners in the decision and opinion rendered in October 1930, but the Commission, in its decision, stated that this was no departure from the rules. In fact, the concurrence of the Umpire in the opinion of the two National Commissioners is in direct compliance with subdivision (d) quoted above, and it changes neither the rules of the Commission as to *disagreements* between the National Commissioners and the power of the Umpire to pass upon those disagreements after a written certificate as required by subdivision (a) above, nor does it convert the Commission into a Commission of three as in the *Cauca* case (*infra*).

The case of *Colombia* v. *Cauca Company*, 190 U. S. 524, is relied upon by the respondents. In that case, Colombia, having seized the railroad of the Cauca Company, entered into an agreement with the United States, by which the validity of its seizure was recognized in return for its agreement to pay whatever the commission should find to be due claimant. The Republic of Colombia submitted its differences to arbitration. The action was brought to set aside the award in favor of the defendant. The defendant filed a cross-bill to confirm the award. The agreement of submission provided that three members were to constitute the commission which was itself to act as a unit and to prescribe its own rules of procedure. *The commission with the consent of all parties adopted a rule that its decisions might be made by a majority vote.* After the defendant's claim had been fully heard on the merits by all three members, after voluminous evidence had been considered on the merits

by all three members, after the *quantum* of the award had been carefully determined by the acceptance of certain items of damage and the rejection of others by all three members, and "at the end of the trial, when hardly anything remained to be done except to sign the award, the questions remaining open concerning only matters of interest", one of the commissioners resigned. Under such circumstances, the court upheld a majority award, but proceeded to disallow two items of damage as in excess of the commission's jurisdiction, to wit: (1) a $135,000 item for cash paid by the claimant to purchase the railroad concession and (2) a $29,200 item voted by the claimant to its officers for services in securing the agreement of submission. Mr. Justice Holmes succinctly stated (at p. 580):

> "It is for us to determine the scope of the commission, whatever may have been its own finding with regard to its powers."

The case is therefore clear authority for the court's power to review the propriety of a tribunal's action in determining its own jurisdiction, if its award is *ultra vires*, and likewise indicates that the alleged sabotage awards were *ultra vires*, as is evident by contrasting that case with the situation at bar:

(1) There the commission was to act as a unit and decide by majority vote; here the two commissioners acted if in agreement, and the Umpire could function only on a certification of disagreement, signed by both commissioners;

(2) There the retirement of one of the three commissioners would have necessarily frustrated the submission because of a time limit in the submission agreement, no provision being made for the appoint-

ment of a successor; here there was no time limit and the submission agreement itself provided the mechanics for the appointment of a successor;

(3) There the awards had already been heard and decided on the merits at the time of retirement—even the amount of the damage had been decided (with the exception of an interest item) after a full presentation directed squarely to the items of possible damage; here there had been no hearing or decision on the merits and specific reservation for some future time of the merits and the *quantum* of the damage, if any; all that was then pending was a motion to reopen a dismissal made nine years before on the merits;

(4) There the commission had yet to take merely formal action on the claim; here the commission was *functus officio* by the dismissal of the claim on the merits nine years ago.

(*d*) *An award not within the jurisdiction or power of the Commission is a nullity.*

In Administrative Decision No. II, Judge Parker ruled that the Mixed Claims Commission between the United States and Germany was a tribunal of limited jurisdiction. He said (p. 5):

"This Commission was established and exists in pursuance of the terms of the Agreement between the United States and Germany dated August 10, 1922. Here are found the source of, and limitations upon, the Commission's powers and jurisdiction in the discharge of its task of determining the amount to be paid by Germany in satisfaction of her financial obligations to the United States and to American nationals under the Treaty of Berlin."

Oppenheim, International Law, 5th Ed., Vol. 2, page 28, in stating the principles by which International arbitration is governed, says:

> "The first is that their jurisdiction is essentially grounded in the will of the parties as expressed in the *compromis* or in the general arbitration treaty, and that an award rendered in excess of the power conferred upon them is null and void as having no legal basis whatever."

Ralston, The Law and Procedure of International Tribunals, §51, pages 42, 43, likewise says:

> "51. JURISDICTION TO GRANT PARTICULAR RELIEF—The third question involved in the application of the word 'jurisdiction' is, had the court the right to grant the particular award asked for or given by it in the case before it? In the nature of things, arbitral courts have very rarely so far exceeded their acknowledged power in this regard that their actions have been the subject of later challenge. Nevertheless cases of having done so, exist.
>
> "In the judgment of the United States, the King of the Netherlands exceeded his power as an arbitrator and undertook to act as a mediator in the case of the Northeastern Boundaries. This country, therefore, refused to carry out the decision as it constituted a departure from the powers of the arbitrator, and Great Britain joined in waiving the award. The same assertion was made as to the award in the *Chamizal* case with Mexico.
>
> "The direct point we have under consideration was presented to the Hague Permanent Court of Arbitration in the *Orinoco Shipping Company* case. By the treaty referring this, according to the opinion of the court, Venezuela and the United States had 'at least implicitly agreed', that 'vices involving the nullity of an arbitral decision, were excessive exer-

cise of jurisdiction and essential error in the judgment (*exceso de poder y error esencial en el fallo*), and the United States had alleged excessive exercise of jurisdiction and numerous errors in law and fact equivalent to essential error. The court remarked that,

> 'excessive exercise of power may consist, not alone in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of the law to be applied.'

"It has rarely been possible for local courts of any other bodies to review international awards with the idea of determining whether or not the arbitral court had exceeded its power in granting the award. Nevertheless such an occasion arose in the case of *Colombia* v. *Cauca Company*. In this case the Supreme Court of the United States said:

> 'The main and serious question of the case is whether the scope of the submission was exceeded by any items of the award. * * * The only fair way is to take the language (of the arbitral agreement) in its natural sense, not straining it either way. * * * It is for us to determine the scope of the commission, whatever may have been its own finding with regard to its powers. When its powers are established we are not called upon to revise any finding that could have been made without going beyond the line which we lay down.'"

Lammasch, "Handbuch des Voelkerrechts", Schiedsgerichtsbarkeit, pages 212, 213, thus states the rule:

"If the arbitrator exceeds his powers, his verdict is null and void as an award, * * *." (Translation.)

Ralston in an article on *International Awards* uses the following language (Va. Law Review, Vol. 15, p. 8):

> *"It must be recognized that an award which goes beyond the terms of the compromis is, to such extent, null and void.* It was the belief of the United States in the case of the Northeastern Boundaries that the King of the Netherlands exceeded his power as an arbitrator and undertook to act as mediator. The United States, therefore, refused to carry out the decision as a departure from the powers of the arbitrator, and Great Britain joined in waiving the award." (Italics ours.)

In view of the principle thus authoritatively established and repeatedly applied, it is clear that the so-called award of 1939 in favor of the Sabotage Claimants constituted a usurpation of powers to which the following passage in an article by the Norwegian Professor Castberg, L'Exces de Pouvoir dans la Justice Internationale Academie de Droit International, Recueil des Cours, 1931, I, p. 448, is directly applicable:

> "If there has been a usurpation of power, the so-called 'judgment', pronounced by the judge, has in reality no value as judgment. It is absolutely void. It is non-existent from a juridical point of view." (Translation ours.)

Castberg, *supra*, also in the same article says (p. 388) in regard to non-observance of the rules of the Commission:

> "An arbitral tribunal may also commit an excess of power by applying to its proceedings rules of procedure differing from those which were prescribed to the tribunal. This disregard of the rules of pro-

cedure does also involve an excess of power." (Translation ours.)

and further at page 442:

"If an international tribunal would assume a power without basing it on an agreement between the parties, there would actually be a usurpation of power. The judgment should then be a nullity for the parties. The same would be true if the judgment is only apparently based upon an agreement of the parties—in other words, if the reference by the court to the agreement between the parties is only aimed to cover a usurpation of power. Also in this case the judgment would be a nullity." (Translation ours.)

It is suggested by respondents that the decision of the Umpire as to the extent of his own powers is binding. Aside from the fact that his own decision was not the decision of the Commission, the "Bootstrap doctrine" (53 Harvard Law Review 652) that a decision of a court as to its own jurisdiction is *res adjudicata*, has no application here. Such decisions as *Stoll* v. *Gottlieb*, 305 U. S. 165 and *Chicot County Drainage Dist.* v. *Baxter State Bank*, 60 Sup. Ct. 317, rest upon the age-old doctrine that courts of general jurisdiction, such as federal courts in bankruptcy, have the power "to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act" (60 Sup. Ct. at 319).

The doctrine of *Stoll* v. *Gottlieb* cannot apply to an arbitral tribunal which derives its charter from an agreement between two governments. Such a tribunal is no more a court with broad inherent powers than is a private arbitral tribunal; and it is elementary law that in a private arbitration the arbiters cannot go beyond the terms of the submission. In other words, a mixed arbitral

tribunal cannot, by its fiat, extend its jurisdiction. A federal district court, though in one sense a court of limited jurisdiction, is not regarded as an inferior court (15 C. J. 722). Within the boundaries of its jurisdiction it has certain inherent powers. But no such inherent powers can be ascribed to a mixed arbitral tribunal, which, as an international tribunal, has no power beyond that which has been specifically delegated to it by the sovereignties which created it.

(*e*) *There was no such disagreement as to authorize the Umpire to function as such, even if the mixed commission had not ceased to exist.*

Respondent-intervener contends that there had been a disagreement of the commissioners such as authorized the Umpire to function under the terms of his mandate, but the contrary appears from the correspondence.

By a letter of March 1, 1939, the German Commissioner addressed to the Umpire, Justice Roberts, a letter apprising the latter of his retirement (R. 145). Had he stopped here and said no more, we hardly see how, under the terms of the treaty, his retirement could have been contested, to say nothing of treating it as if it had not been made. Nevertheless, he went on to give his reasons, the substance of which was that he was convinced that the Umpire was not acting impartially. Usually an umpire does not sit with the commissioners, but we may assume that he is at liberty to do so if they desire it. Such a procedure might even have its advantages, if the umpire should limit himself to trying to bring the commissioners together; but this object would be worse than defeated if he sought, by siding with the one, to coerce the other. In the present instance the Umpire, by *expressing* or *committing* himself to a final conclusion before the Commissioners had put their respective opinions in definite

and final written form practically invited the retirement of the German Commissioner.

This view is justified and confirmed by the letter of the United States Commissioner, Mr. Garnett, of March 3, 1939 (R. 150), in which he explicitly states that at the last meeting it was "agreed that we should proceed to examine the whole record to determine whether, upon the whole record, the American case has been proven", and that it was while they were examining this question that the German Commissioner retired. This seems to be destructive of the theory later advanced by Mr. Garnett that the German Commissioner's withdrawal is to be treated as ineffective because it prevented them from rendering a decision on opinions finally arrived at and stated (R. 178). It also completely undermines the assertion that when Umpire Roberts assumed to make an award, he had before him that final disagreement of the Commissioners which was essential to his exercise of the power to decide.

What we have here stated is furtherinore confirmed by the last two paragraphs of Commissioner Garnett's letter to Mr. Hull, Secretary of State, of March 3, 1939. The paragraph next to the last expressly states that the subject of the conference between the Commissioners and the Umpire on February 28 and March 1, 1939, was whether the evidence adduced to prove that the Hamburg award was induced by fraudulent testimony was sufficient for that purpose (R. 151). The last paragraph reads as follows:

> "After the conference had extended for a considerable time, the Umpire expressed himself in entire agreement with me on this proposition. Thereupon the German Commissioner argued that, if upon an examination of the whole record both before and

subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague argument, the petition would have to be dismissed, and he urged upon the Umpire and myself that we should consider the whole evidence for that purpose. We thereupon proceeded to examine the whole record to determine from that record whether the American case had been proven. It was while the Commission was engaged in examining this question that Dr. Huecking's action in regard to his retirement was taken" (R. 151).

The foregoing paragraph, it will be observed, expressly admits that, when the German Commissioner retired, the Commissioners and the Umpire were engaged in examining "the whole record to determine from that record whether the American case had been proven," and that "it was while the Commission was examining this question" that the German Commissioner retired (R. 152).

To claim, on the face of this statement, that, when the German Commissioner retired, there was a final disagreement such as justified the Umpire in proceeding to make an award, is in effect to concede the German Commissioner's contention that the United States Commissioner, to say nothing of the Umpire, was not participating in the deliberation with an open mind. Nor would this aspect of the matter be mitigated by the retort that the German Commissioner was not participating in the examination of the record with an open mind. Dealing with the case as it stands, the material thing is the fact that, as the Commissioners and the Umpire, when the German Commissioner retired, were, according to the American Commissioner's own recorded admission, engaged in an examination of all the evidence with a view to determine

what their eventual position should be, it is not possible legally to defend the contention that the Umpire's award was rendered upon such a disagreement between the Commissioners as the arbitral agreement contemplates.

A court, consisting of several judges, never reaches a stage of disagreement simply because varying views are expressed during a discussion or consultation concerning the case before the court.

(*f*) *Frustration by retirement could not give consent.*

It is claimed that the work of the Commission was frustrated by the German Commissioner and that this frustration was equivalent to a consent that the remaining members should decide all issues.

Such a claim is legally unjustified. There certainly is nothing in the treaty that either directly or by implication empowers one of the Commissioners and the Umpire to sit in judgment upon the retirement of the other Commissioner, and still less is there anything to warrant the assumption that the Mixed Commission may, under any circumstances, be said to consist of the Commissioner of only one of the parties and the Umpire. In this connection attention may be called to the fact that the Commission's rules of procedure speak of the "two national commissioners" who are to certify disagreements or points of difference to the Umpire. This language merely accentuates the fact that a "mixed commission" between two countries is fundamentally thought of as comprising an appointee or appointees of each of the contracting parties. No doubt either party might, should it see fit to do so, appoint as its Commissioner a citizen of another country. As regards its appointee, each contracting party may freely make its own selection; but, in order that an arbitral tribunal may function as a

mixed commission, each party must be effectively represented on it by its own appointee.

By the express terms of the agreement which constituted the Mixed Claims Commission there need not have been any Umpire, if the Commissioners had always agreed, thus emphasizing the fact that the two Commissioners were the *essential constitutents* of the Mixed Commission. Obviously, an umpire cannot be considered as a national representative, it being his function to exercise an impartial judgment and to this end he is not to be regarded as the representative of either of the contracting parties. Constitutional powers are derived from the charter under which they are exercised, and the theory that they may be derived from or expanded by the alleged misconduct of one of the parties to the agreement is, we believe, altogether new.

IV.

The Commission made no awards in favor of the sabotage claimants, because the Commission was *functus officio* and not empowered to grant a rehearing.

(a) *The Commission, after it had made an award, had no power to substitute for it a new and different award unless with the consent of both sovereigns.*

The facts of this case furnish justification for the rule that a final award is subject to revision only with the express consent of the contesting sovereigns.

On October 16, 1930, the Commission dismissed the sabotage claims (R. 224, 260), remarking that fraud and perjury permeated the evidence adduced by both sides (R. 261-265); and on March 30, 1931 and December 3, 1932, applications for rehearing were also dismissed (R. 225).

More than nine years later, on October 30, 1939, after two applications for rehearing were denied, the Commission, with a new personnel, including a third successive Umpire, granted a rehearing on the ground of fraud, although that allegation was dealt with in the original dismissal (R. 261-265).

Submission to arbitration should not and does not subject the contracting sovereigns to successive rehearings and reopenings of awards.*

It casts no reflection on any umpire or any commissioner to say that such a practice would be fraught with the possibility of grave abuse and would put the entire system in peril. If each successive commissioner or umpire could reopen and retry what his predecessor had done, chaos would readily ensue, and there would be no end of litigation or any consistence or certainty in it. While this rule prevails in private litigation it is even more important in the international sphere in which the parties to the process are independent and sovereign states.

The authorities are clear that a final award may not be set aside or a new award made without the consent of both sovereigns.

In *Hyde on International Law* (Vol. 2, p. 157) the rule is thus stated:

> "The decision of an international tribunal over matters as to which it is made the supreme arbiter

* In private arbitrations when an award has been delivered the arbitrators have no power to rejudge the case or alter the award nor perfect it by executing a supplemental award. *Flannery* v. *Sahagian*, 134 N. Y. 85, 31 N. E. 319; *Herbst* v. *Hagenaers*, 137 N. Y. 290, 33 N. E. 315. If the original award was procured by fraud, it may, under certain circumstances, be set aside by a court; but the arbitrators have no power to render another award in the absence of a resubmission, and in the absence of statute, the resubmission must be by the parties themselves (Sturges: Commercial Arbitrations and Awards, page 805, and cases there cited in note 146).

is said to be final, and not the subject of revision, except by the consent of the contesting sovereigns."

In the *Cerruti* case (*Italy* v. *Colombia*), 10 Rev. du Droit Pub. 523, 526, President Cleveland was the arbitrator. The Colombian Government protested against Article 5 of the award. Secretary of State Sherman replied to the Colombian Minister, May 9, 1897 (For. Rel. 1898, pp. 250, 251):

> "The President of the United States, whether he be the individual who acted as arbitrator or his successor in office, became, under any circumstances, *functus officio*, so far as the arbitration was concerned, upon the rendition of his award, and could not undertake to reopen the arbitration and reconsider the award under any just view of the powers conferred upon him as arbitrator by the protocol under which he acted. Should the parties to the arbitration invite the reconsideration of the award in question, in whole or part, or request its interpretation in any respect, that could only be accomplished by a new submission and arbitration."

To this effect see also *Claim of Manuel de Cala*, 2 Moore's International Arbitrations, 1273-4.

In the *Claim of Benjamin Weil*, 2 Moore's International Arbitrations 1324, 7 Moore's Digest 63-8, an award in favor of claimant Weil had been made by the United States and Mexican Claims Commission of 1868.

Upon an application for rehearing the Umpire refused the motion on the ground, as stated in Moore's Int. Arb., Vol. II, page 1329:

> "* * * (1) that he had no right to consider any evidence besides 'that which had already been before the commissioners, had been examined by them, and transmitted to the umpire'; (2) that, as he had already examined that evidence with all the care of

which he was capable, it was not likely that a re-examination of it would alter his opinion; (3) that as his decisions had, without his wishes being consulted, been made public, *and as they were known by the convention to be final and without appeal,* it was probable that they had been made the basis of transactions which an alteration or reversal of them might seriously prejudice; and (4) *that, in his opinion, the provisions of the convention in effect debarred him from rehearing cases which he had already decided, and deprived each government of the right to expect that any claim should be reheard.*" (Italics ours.)

In *Frelinghuysen v. Key*, 110 U. S. 63, which was an action by the assignee of part of the *Weil* claim to mandamus the Secretary of the Treasury to pay the award, Chief Justice Waite of the Supreme Court said at page 72:

> "As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two governments, or otherwise. Mexico cannot, under the terms of the treaty, refuse to make the payments at the times agreed on if required by the United States. This she does not now seek to do."

This language was approved in *Boynton v. Blaine*, 139 U. S. 306, 321-2 (1891).

In *Ralston, The Law and Procedure of International Tribunals*, §371, pages 207-8, the following is stated:

> "371. *Rehearings and revision.*—Rehearings have been repeatedly refused by umpires, either of their own decisions or of those of their predecessors, such being also the stand taken by the commission appointed pursuant to the treaty of Guadalupe Hidalgo, and it being said by Baron Blanc of the Spanish-American Claims Commission that he did not con-

sider himself 'empowered to review the formal decisions of the precedent umpires, such decisions being essentially definitive, according to international usages.'"

Nor has there been a single instance in which the present Mixed Commission, when legally constituted and actually existing, set aside or revised its awards, except "on agreed statements, recommending awards, signed by both the German Agent and the Agent of the United States" (R. 93).

In the *American Journal of International Law* of January, 1940, pages 23 *et seq.*, at page 34, Mr. L. H. Woolsey, a former solicitor of the Department of State, who is now counsel for one of the sabotage claimants, referring to the decision of June 15, 1939, stated as follows:

> *"The significance of this decision in international law is that it is the first instance known to the writer in which a decision of an international tribunal obtained by fraud, collusion, and suppression of evidence by witnesses of one of the parties has been reopened and reheard by the tribunal itself."* (Italics ours.)*

On this article, Professor Thomas E. Baty, a British authority on international law and legal adviser to the Japanese Foreign Office (May 1940 Journal of International Law and Arbitration (Japanese), Vol. 39, No. 5, page 5, in English), makes the following comment:

> "Mr. L. H. Woolsey recurs to the topic of the Reopening of Arbitral Awards (American claims

* This article refers to "fraud, collusion and suppression of evidence by witnesses of one of the parties" but we direct the Court's attention to the fact that in the decision of October 16, 1930, the Commission found that both sides had been guilty of fraud and perjury, and in the decision of December 3, 1932, Umpire Roberts found fraud, fabrication and suppression of evidence by witnesses on behalf of the sabotage claimants. (Dec. & Op., p. 1010 *et seq.*)

against Germany) which he regards as a step forward in the history of International arbitration. It may, however, be legitimately thought that nations will hesitate to conclude arbitration agreements if they are thereby clothing their arbitrators with a wide power to define their own authority."

As regards the finality of decisions, Article VI of the Agreement between the United States and Germany of August 10, 1922, creating the Mixed Claims Commission, expressly provides that "The decisions of the Commission and those of the Umpire (in case there may be any) shall be accepted as final and binding upon the two Governments." Accordingly, the rules enacted by the Commission do not provide for a rehearing, nor did the Commission, when legally constituted and actually existing, ever grant a rehearing.

In *U. S. on Behalf of Philadelphia—Girard National Bank*, Op. and Dec., page 939, the Commission, referring to a claim previously dismissed, said (p. 940):

> "Although the rules of this Commission, conforming to the practice of international Commissions, make no provision for a rehearing in any case in which a final decree has been made, this Petition and the supporting Memorandum and evidence have been carefully considered by the Commission."

To the same effect see: *U. S. on Behalf of S. Staniwood Menken* v. *Germany*, Op. and Dec., page 837; *U. S. on Behalf of Knickerbocker Insurance Co.* v. *Germany*, Op. and Dec., pages 912, 914.

Many of the awards of the Mixed Claims Commission were accordingly made by the two Commissioners without calling in the Umpire who was authorized to function only after a certification of disagreement. The decisions thus made are final and binding, and it would be contrary

to the terms of the agreement if such awards were reopened by a fresh disagreement and a calling in of the Umpire.

Furthermore, as above pointed out, the Mixed Claims Commission is a court of limited jurisdiction with only such powers as are granted by the agreement creating it. It has, therefore, no inherent powers. It is in this respect similar to inferior courts with limited jurisdiction as to which it has been frequently held that without specific statutory grant they have no power to grant a new trial. *Williams* v. *The Trademen's Fire Insurance Co.*, 1 Daly 437; *Hecht* v. *Mothner*, 4 Misc. 536; *Arellano* v. *Chacon*, 1 N. Mex. 269; *Warren* v. *African Baptist Church*, 50 Miss. 223, 227.

(*b*) *Germany never consented to a new award.*

The alleged consent upon which respondents rely was not given by Germany or the German Commissioner. It was nothing more than a statement on oral argument by the German Agent in 1932, instantly repudiated by the German Commissioner in his written certificate to the Umpire, and recognized by the Umpire himself to have been repudiated by Germany in 1933. Thereafter, Germany consistently and insistently took the position that it had not and did not consent to any such power in the Umpire.

The facts are as follows:

After the first petition for rehearing on the original record had been denied, the Commission of its own motion by letter to each Agent raised the question of its jurisdiction to receive newly discovered evidence. In the brief filed in reply, on April 27, 1931, "the German Agent took the position that the Commission was without jurisdiction to reopen any case in which it had once rendered

a decision" (R. 86). On July 1, 1931, a supplemental petition together with new evidence was filed (R. 86). There was oral argument on this petition in Boston in 1931 and in Washington in November 1932. It was upon the occasion of this argument, in November 1932, in answer to the Umpire's inquiry, that the German Agent stated that the determination of its own jurisdiction was a justiciable question within the power of the Commission to determine (R. 87). On November 28, 1932, the National Commissioners certified their disagreement to the Umpire on all questions involved (R. 88)

> "except that the German Commissioner takes the position that the question of the jurisdiction of the Commission to reexamine any case after a final decision has been rendered is *not* a proper question to be certified to the Umpire on disagreement of the National Commissioners and *reserves that question from this certificate.*" (Italics ours.)

The opinion of the Umpire, holding the new evidence insufficient to justify a rehearing (R. 225), recognized that there had been no consent to his authority to determine jurisdiction and refrained from passing upon any such question (R. 227):

> "The German Commissioner's position is that while the two Commissioners by mutual agreement may reopen in such a situation, they may not do so where, as here, one of the Commissioners opposes the reopening. The German Commissioner does so oppose in this case. The conclusions I have expressed make it unnecessary to pass upon the question just stated."

A third petition for rehearing was filed by the American Agent on May 4, 1933. The German Ambassador promptly wrote the State Department that (R. 90, 228):

> "The German Government * * * considers petitions

for rehearing in conflict with existing treaty provisions, * * * The German Government regards the commission as being without authority to pass upon a difference of opinion which may exist between the two governments in this connection.

* * * He [the German Commissioner] has no authority to act with respect to the petitions offered by the American Agent * * *."

The State Department took the contrary view and instructed its Agents to obtain "the decision of the Umpire on this disputed point" (R. 90), *i. e.*, to ask the Umpire to determine the Commission's jurisdiction *in invitum* the German Government.

Prior to December 15, 1933, there were submitted to the Umpire two opinions of the American Commissioner and two opinions of the German Commissioner together with a letter of the then acting German Agent Lohmann, in which letter the following excerpt from the minutes of the meeting of October 30, 1933 was quoted (R. 229):

"'it is understood that it is the position of the German Agent that he is not authorized to take any part in this proceeding, and the Umpire further stated that the Umpire will be entirely willing to receive any observations or representations the German Agent may wish to make in the pending matter and he is willing to receive such as in the nature of a special appearance as not conceding anything and without prejudice to the position of the German Agent's Government before the Commission.'"

On December 15, 1933, Umpire Roberts reaffirmed the Commission's lack of power to reopen the case for after-discovered evidence but affirmed its power to open the case if the former decision had been induced by fraud and collusion (R. 229).

On May 7, 1934, the German Ambassador wrote the Secretary of State (R. 135):

> "I should be grateful to Your Excellency if you would advise me that the American Government agrees with the German Government that the Mixed Claims Commission, United States and Germany, shall not be asked in the future to consider new cases or cases already decided except the sabotage cases * * *."

to which the Secretary agreed (R. 137).

The mere fact that in May, 1934, by exchange of notes, it was mentioned that the sabotage claims were still pending, does not signify any consent on the part of the German Government that the Commission had jurisdiction to rehear the claims.

On July 29, 1935, on the certificate of disagreement, the Umpire held the proceedings limited to a petition for rehearing and not on the merits, stating:

> "* * * The relevancy and weight of evidence upon the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits, if a rehearing be granted, will be quite a different thing.
>
> It is, of course, conceivable that the Commission should hear argument on both the propriety of reopening the case and the merits at one and the same time. Much may be said pro and con on such a procedure. Nevertheless, I suppose that if the parties were in agreement that this course should be followed, the Commission would acquiesce. There is no such agreement. Germany insists that the preliminary question be determined separately. I am of opinion this is her right. She now has a judgment. Before that judgment may be set aside and a new hearing held upon the merits, it is incumbent upon

the claimants to sustain the affirmative of the issues made by their petition. The next hearing, therefore, will be upon the question of reopening *vel non*, and not upon the merits."

On June 3, 1936, the Commission unanimously set aside its decision of December 3, 1932 dismissing a petition for rehearing, and entertained a petition for rehearing, stating (R. 140):

"Before the Hague decision [the original awards] may be set aside, the Commission must act upon the claimant's petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, unless Germany shall agree to a different course, must, under the Commission's decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits. Both parties are entitled to file evidence (and to exchange briefs) as well in the proceedings in which a ruling for a reopening is sought as in the subsequent proceedings dealing with the merits, should such a ruling be granted. Evidence filed and briefs submitted in the proceedings, in which a reopening is sought, must remain within the limitations set by the Commission's Decision dated December 15, 1933."

After a long delay in which settlement negotiations failed, evidence was filed by both sides and the cases orally argued, ending January 27, 1939 (R. 96). Even though the opinions of July 29, 1935 and June 3, 1936 stated definitely that *unless Germany should agree to a different course*, the question whether there should be a rehearing must be determined by a hearing separate and distinct from any argument on the merits, *and even though Germany did not agree to such different course*, the American Agent renewed his request for a hearing

on the merits in his brief filed September 12, 1938, and in his oral argument in January 1939. To both of these requests, the German Agent answered that *Germany had not agreed to a different course.* On March 1, 1939, the German Commissioner withdrew (R. 145-147), and on June 10, 1939, the German Embassy called the attention of our State Department, with respect to a proposed meeting of the Commission, to its contention that the Commission had ceased to function (R. 100):

> "By direction of my Government, I call attention to the fact that since the withdrawal of the German Commissioner, * * *, the Commission has been incompetent to make decisions and that consequently there is no legal basis for a meeting of the Commission at this stage. By direction of my Government, I advise you that the Government of the Reich will ignore the decision to call the meeting on June 15th, as well as any other act of the Commission that might take place in violation of the International Agreement of August 10, 1922 and the generally established rules of procedure."

On June 15, 1939, without having a new trial, the alleged Commission, upon the motion of the American Agent, without any argument, and without notice, directed an award to the sabotage claimants, in the following language (R. 242):

> "The Umpire: In view of what appears in the record, and based upon the American Agent's motion, the Commission is prepared to sign awards, to be submitted by the American Agent, if approved by the Commission as to form. Those may be submitted, and if approved will be made at a further meeting to be called on notice."

It is contended by the respondent-intervener, and in

support thereof there is submitted Martin's affidavit, that the German Agent consented to a decision on the merits. In the answering affidavit (R. 231-235), it is clearly established that Germany never consented to a decision on the merits even if the motions for reopening were granted.

Again it is claimed that because the German Commissioner requested an examination of the evidence presented by the American side, to determine whether perjury by the American witnesses had been committed to such an extent on the American side that a reopening would not be warranted, Germany had requested a decision on the merits.

There is no warrant for such an inference.

But even assuming the German Agent had consented that the Commission or, in case of disagreement (followed by appropriate certificate), the Umpire should be empowered to grant a rehearing, such consent does not carry with it the power to grant a new judgment without an actual rehearing and the submission by both sides of proofs if so advised. The distinction is well recognized in our law: power to grant a new trial does not carry with it the right to grant a new judgment. It also has practical significance. The effect of a vacatur of the original dismissal would be to leave *both* sovereigns free to take such steps with respect to the claims as their respective sovereignties might deem desirable, unhampered by earlier awards claimed to have been induced by fraud.

The fact remains that Germany never consented to the rendition of new and different awards in a manner never contemplated by the terms of the submission; and the Congress never intended to appropriate funds to the payment of any alleged awards under the circumstances here disclosed.

V.

The shares of stock of Agency of Canadian Car & Foundry Company, Ltd., being entirely owned by Canadian Car & Foundry Company, Ltd., a Canadian national, the Commission had no jurisdiction to grant it any award.

Petitioner contends that, as the Commission's jurisdiction is limited to claims of United States nationals, an award to a Frenchman, a Canadian, or any other non-American national, is wholly void, both because it is contrary to the express terms of the agreement, and because it would deprive American nationals of their proportionate share of the special deposit fund out of which awards are paid.

In the case of Agency of Canadian Car & Foundry Co., Ltd., there is no dispute that the shares of stock of the claimant company are entirely foreign-owned (R. 186); we contend that the court cannot obtain jurisdiction by reason of the fact that some of the shares of the *parent* company are American-owned.

In Administrative Decision No. II (Dec. and Op. Mixed Claims Commission U. S. and Germany, p. 8), the Commission held:

> *"Original and continuous ownership of claim.*—In order to bring a claim (other than a Government claim) within the jurisdiction of this Commission, the loss must have been suffered by an American national, and the claim for such loss must have since continued in American ownership."

Prior to the pronouncement of the American Commissioner and the Umpire in favor of the Agency of Canadian Car & Foundry Company, Ltd., when the Mixed Claims

Commission was legally in suspension, the Commission, legally constituted and validly functioning, uniformly held that awards could be made only in favor of American nationals.

In *H. Herrmann Manufacturing Co.* (M. C. C., U. S. and Ger. Docket No. 173), 95% of the shares of the Company were held by H. Herrmann, Ltd., London, a British corporation. The German Agent contended that the H. Herrmann Manufacturing Co. could not claim before the Commission. The American Agent opposed this contention.

Briefs were exchanged, and the two national Commissioners, unable to agree submitted their opposing opinions to the Umpire. As a result the claim was withdrawn.

In the case of *American Congo Company* (M. C. C., U. S. and Ger. Docket No. 504), an award was made for the amount of $75,000 by the signing of an agreed statement in which it was said:

> "* * * this amount represents American interests in the proceeds of the award that may be entered herein."

In the case of *Gans Steamship Line* (M. C. C., U. S. and Ger. Docket No. 6625), it appeared that 20% of the claim was impressed with German nationality, and thereupon a decision was rendered for

> "An award limited to the American interest in this claim * * * for the use and benefit of such American interest" (Dec. & Op., p. 741).

In *A. Klipstein and Co.* (M. C. C., U. S. and Ger. Docket No. 540), the claimant was a corporation organized under the laws of New Jersey. All of the stockholders were American nationals since February 8, 1917, but one of

them, August Klipstein, who owned 1140 shares out of a total of 2000 was not naturalized until that day. In view of the particular circumstances of the case, the German Agent was prepared to consider it as sufficient that the claim had been entirely impressed with American nationality prior to the entry of the United States into the war. Solely by reason of these circumstances, was an award granted to the claimant.

In *Lezcano & Company, sucesores* (M. C. C., U. S. and Ger. Docket No. 13787), all of the partners were nationals of Spain. The American Agent said:

> "* * * the American Commissioner has informed the American Agent that if a *real American interest other than that of the partnership entity* should be shown to exist in the claimant partnership the Commission would look into the case again." (Italics ours.)

In *Henry Cachard and Herman Harjes* (Dec. and Op. M. C. C., U. S. and Ger., p. 634), claim was made by two executors of an estate, all of whose heirs were of French nationality. The claim was dismissed on the ground that "the entire beneficial interest in the claim is in French nationals".

In *Societé du Chemin de Fer de Bagdad* (Dec. of Mixed Arbitral Tribunals, Vol. I, pp. 401-407) the Franco-German Mixed Arbitral Tribunal laid down the following rule:

> "Moreover, it is thoroughly in accord with the spirit of the Peace Treaty to pay less attention to questions purely formal than to palpable economic realities; consequently, when the nationality of a corporation is to be determined more weight must be given to the interests represented therein than to

the outward appearance which may conceal such interests. In the present case the circumstances that both corporations are described as Ottoman (Turkish) and that their charter seat is Turkey must be considered as purely formal and not of decisive importance."

In the case of *I'm Alone*, 29 American Journal of International Law (1935), page 326, a tribunal was created under an agreement between Canada and the United States consisting of Justice Van Devanter of the Supreme Court of the United States and Judge Duff of the Supreme Court of Canada, to determine the amounts due Canadian citizens by our Government. The first question was whether the Commissioners could enquire into the beneficial or ultimate ownership of the "I'm Alone" or of the shares of the Canadian corporation that owned the ship. The answer was in the affirmative, and in the final report, the Commissioners decided (p. 330) *that in view of the fact that the beneficial ownership was entirely in citizens of the United States, no compensation ought to be paid in respect of the loss of the ship or the cargo.*

In *Ralston's Law and Procedure of International Tribunals*, Rev. Ed., page 155, the following is stated (citing numerous authorities):

"The mixed commissions sitting by virtue of the Versailles and subsequent treaties have several times rendered decisions upon the general subject.

"Thus, for instance, it has been held that a corporation formed in Germany and controlled by Frenchmen can claim as a victim of exceptional measures of war, a house which has its site for business affairs in Germany, but of which no associate is German, cannot be considered as a German subject * * *."

Furthermore, it has been the practice of the State Department for many years, when requested by a corporate claimant to present and prosecute its claim against a foreign government, to require such corporate claimant to set forth the proportion of American interest in such corporation and to sponsor such claim only to the extent of the American interest. Such was the requirement in connection with claims before the Mixed Claims Commission, United States and Germany, and such was, for example, the requirement in connection with claims for losses or damages sustained in Spain (a rule common to the general claims circular issued by the Department).

We quote the following requirement in connection with the last mentioned claim from the mimeographed circular of the State Department entitled "Statement for the General Information of American Nationals Desiring to Present International Pecuniary Claims for Losses or Damages Sustained in Spain":

"• • • • • • • • • • •

Third. If the claimant is an incorporated organization, the date and place of incorporation, and the approximate proportion of the capital stock owned by American nationals or American organizations should be shown. If a claimant organization is unincorporated, the extent of the ownership of such organization by American nationals or American organizations should be similarly shown. See in this relation the attached memorandum A-1."

Said Memorandum A-1 is entitled "Memorandum in Relation to Evidence Necessary to Establish the American Nationality of Corporations, Joint Stock Companies and Partnerships" and contains the following:

"(3) Evidence of the American nationality of each officer and director who is an American citizen. (See

the attached Memorandum A in relation to Evidence Necessary to Establish American Nationality.)"

The question of nationality is jurisdictional.

Burthe v. *Denis*, 133 U. S. 514.

In that case a claim, French in origin, was presented by France on behalf of the executor of the estate of a French national for the value of the property damaged through occupation by the military authorities of the United States. Some of the heirs of the French national, who had a beneficial interest in the claim, were French citizens, others Americans. The Supreme Court held that the Commission under the express terms of the Convention between United States and France creating it was without jurisdiction to consider the claim of the Americans and make an award in their favor.

If this Court may reject an administrative ruling when it conflicts with established decision (*cf. Estate of Sanford* v. *Comm'r.*, 308 U. S. 39, at 53) it should *a fortiori* reject a *single* administrative ruling which conflicts both with an earlier *practice* and the *decisions* of this Court.

> "Judicial obeisance to administrative action cannot be pressed so far" (*Haggar Co.* v. *Helvering*, 308 U. S. 389, at 398).

VI.

Since issues of fact are involved, respondent-intervener's application for summary judgment should in any event be denied.

It seems to us that this very important case has been disposed of without a thorough presentation of all the facts. There has been no opportunity to demonstrate the unusual method of arriving at the damages alleged to have

been sustained by the sabotage claimants. The amounts of the awards, on their face, are exceedingly large. As regards the allegation that there has been no proper investigation of the damages suffered, nor anything in the record of the Commission to indicate how the amount of the awards was arrived at, the rules applied thereto, and the investigations that were made (R. 7, 251), the affidavits of the defendant-intervener are absolutely silent (R. 108); and thus the fund, payable to claimants with proper awards, would be payable to the sabotage claimants in a manner entirely *ex parte*.

Furthermore, there are other issues of fact which require judicial investigation, which means the presentation of proofs by the respective parties interested. Heretofore, such opportunity was not afforded to the old awardholders. If the sabotage claimants are entitled to their awards, they should not fear such judicial investigation or trial.

There are at least the following issues of fact raised by the moving and answering affidavits:

> *First*: If the time of the issuance of the certificate is at all relevant, there is an issue of fact as to whether the Certificates of the Secretary of State certifying to the awards were transmitted to the Secretary of the Treasury, with knowledge that this action had been commenced.

It is not disputed that this action was commenced by the filing of the summons and complaint at 9:05 A. M. on October 31, 1939, the day after the rendition of the awards (R. 302); that the Secretary of the Treasury was served at 9:35 A. M. of that day (R. 302); that attempt was made to serve process upon the Secretary of State immediately thereafter (R. 302), and that the Marshal was first in-

formed that he should come the next day (R. 302), and that the Marshal finally succeeded in serving the Legal Adviser, Mr. Hackworth, at about 3:15 of that day, it being claimed that in the meantime the awards had been certified (R. 302).

It appears further that by letters dated June 23, 1939 (R. 307, 309) and October 25, 1939 (R. 305, 306), the Secretary of the Treasury and the Secretary of State were notified that the petitioner protested the awards, and in the two letters dated October 25, 1939 (R. 305, 306), that it would seek an injunction. In the affidavit by Mr. Hackworth it is apparently claimed that acting in behalf of respondent Hull he did not know and that respondent Hull did not know that the action had been commenced or that an injunction against certificates would be sought by petitioner, Z. & F. Assets Realization Corporation.

In other words, on the one hand, it is claimed by the petitioner that the Secretary of State was fully cognizant that a suit for an injunction had already been commenced, and, on the other hand, it is claimed by respondents and respondent-intervener that the Secretary of State was ignorant thereof.

This raises an issue of fact.

Second: Whether the Commission, with Germany's consent, had under consideration the merits of the sabotage claims.

In the moving affidavit of Martin (R. 97), it is asserted that the German Agent consented to a decision on the merits.

In the answering affidavit (R. 231, 235), it is clearly established that Germany never consented to a decision on the merits, even if the motions for reopening were granted. See full discussion of this subject on pages 70 to 72 of this brief.

This at least raises an issue of fact which the lower court had no right to decide adversely to the petitioners.

Third: There is at least an issue of fact whether there was a disagreement between the two national Commissioners authorizing the Umpire to function.

In his letter of March 3, 1939 (R. 290) the German Commissioner states that the Commission was in the midst of its deliberations and no disagreement had been reached. The respondent-intervener claims the contrary. This, again, is an issue of fact which should not have been decided adversely to the petitioners.

VII.

The judgment of the Court of Appeals affirming the judgment of dismissal granted by the District Court of the District of Columbia should be reversed, the respondents' motion to dismiss the complaint and the respondent-intervener's motion for summary judgment should be denied.

Respectfully submitted,

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Appendix.

Constitution of the United States, Article III, Section 2, Clause 1:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

* * * * * * * * * *

Treaty of Berlin, 42 Stat., Part 2, page 1943:

"(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV."

* * * * * * * * * *

Treaty of Versailles, Part X, Article 304:

"(*a*) Within three months from the date of the coming into force of the present Treaty, A Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Germany on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned.

* * * * * * * * * *

"Annex.

1.

"Should one of the members of the Tribunal either die, retire, or be unable for any reason whatever to discharge his function, the same procedure will be

followed for filling the vacancy as was followed for appointing him."

English text of agreement between the United States and Germany for a Mixed Commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded between the two Governments on August 25, 1921, signed August 10, 1922.

AGREEMENT.

The United States of America and Germany being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

THE PRESIDENT OF THE UNITED STATES OF AMERICA, Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany, and THE PRESIDENT OF THE GERMAN EMPIRE, Dr. Wirth, Chancellor of the German Empire, who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I.

The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

ARTICLE II.

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE III.

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They may fix the time and the place of their subsequent meetings according to convenience.

ARTICLE IV.

The commissioners shall keep an accurrate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries

shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

ARTICLE V.

Each Government shall pay its own expenses, including compensation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

ARTICLE VI.

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

ARTICLE VII.

The present agreement shall come into force on the date of its signature.

IN FAITH WHEREOF, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August, 1922.

[SEAL.] ALANSON B. HOUGHTON.

[SEAL.] WIRTH.

Rule VIII of the Rules of Procedure of the Mixed Claims Commission, United States and Germany (as adopted November 15, 1922, and as amended from time to time, to December 31, 1932) as set forth in the Appendix to Opinions and Decisions, Mixed Claims Commission, United States and Germany from October 1, 1926 to December 31, 1932 (p. XLII):

VIII.

Decisions.

(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified.

(b) The Umpire shall at all times have the right to the complete record in any and all cases and to hear oral argument in his discretion.

(c) The Umpire may join with the two National Commissioners in announcing—or in the event of their disagreement certified to him shall announce—principles and rules of decision applicable to a group or groups of cases for the guidance as far as applicable of the American Agent, the German Agent, and their respective counsel, in the preparation and presentation of all claims.

(d) All decisions shall be in writing and signed by (1) the Umpire and the two National Commissioners, or (2) by the two National Commissioners where they are in agreement, or (3) by the Umpire alone when the two National Commissioners have certified their disagreement to him. Such decisions need not state the grounds upon which they are based.

Settlement of War Claims Act of 1928, 45 Stat. 254, Sec. 2.(a), (b), (c), (d); Sec. 4:

SEC. 2. (a) The Secretary of State shall, from time to time, certify to the Secretary of the Treasury the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922, between the United States and Germany (referred to in this Act as the "Mixed Claims Commission").

(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon in accordance with the award, accruing before January 1, 1928.

(c) The Secretary of the Treasury is authorized and directed to pay annually (as nearly as may be) simple interest, at the rate of 5 per centum per annum, upon the amounts payable under subsection (b) and remaining unpaid, beginning January 1, 1928, until paid.

(d) The payments authorized by subsection (b) or (c) shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe, but only out of the German special deposit account created by section 4, within the limitations hereinafter prescribed, and in the order of priority provided in subsection (c) of section 4.

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SEC. 4 (a) There is hereby created in the Treasury a German special deposit account, into which shall be deposited all funds hereinafter specified and from which shall be disbursed all payments authorized by section 2 or 3, including the expenses of administration authorized under subsections (c) and (m) of section 3 and subsection (e) of this section.

(b) The Secretary of the Treasury is authorized

and directed to deposit in such special deposit account—

(1) All sums invested or transferred by the Alien Property Custodian, under the provisions of section 25 of the Trading with the Enemy Act, as amended;

(2) The amounts appropriated under the authority of section 3 (relating to claims of German nationals); and

(3) All money (including the proceeds of any property, rights, or benefits which may be sold or otherwise disposed of, upon such terms as he may prescribe) received, whether before or after the enactment of this Act, by the United States in respect of claims of the United States against Germany on account of the awards of the Mixed Claims Commission.

(c) The Secretary of the Treasury is authorized and directed, out of the funds in such special deposit account, subject to the provisions of subsection (d), and in the following order of priority—

(1) To make the payments of expenses of administration authorized by subsection (c) and (m) of section 3 or subsection (e) of this section;

(2) To make so much of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), as is attributable to an award on account of death or personal injury, together with interest thereon as provided in subsection (c) of section 2;

(3) To make each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount thereof is not payable under paragraph (2) of this subsection and does not exceed $100,000, and to pay interest thereon as provided in subsection (c) of section 2;

(4) To pay the amount of $100,000 in respect of each payment authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), if the amount of such authorized payment is in excess of $100,000 and is not payable in full under paragraph (2) of this subsection. No person shall be paid under this paragraph and paragraph (3) an amount in excess of $100,000 (exclusive of interest beginning January 1, 1928), irrespective of the number of awards made on behalf of such person;

(5) To make additional payments authorized by subsection (b) of section 2 (relating to awards of the Mixed Claims Commission), in such amounts as will make the aggregate payments (authorized by such subsection) under this paragraph and paragraphs (2), (3), and (4) of this subsection equal to 80 per centum of the aggregate amount of all payments authorized by subsection (b) of section 2. Payments under this paragraph shall be prorated on the basis of the amount of the respective payments authorized by subsection (b) of section 2 and remaining unpaid. Pending the completion of the work of the Mixed Claims Commission, the Secretary of the Treasury is authorized to pay such installments of the payments authorized by this paragraph as he determines to be consistent with prompt payment under this paragraph to all persons on behalf of whom claims have been presented to the Commission;

(6) To pay amounts determined by the Secretary of the Treasury to be payable in respect of the tentative awards of the Arbiter, in accordance with the provisions of subsection (s) of section 3 (relating to awards for ships, patents, and radio stations);

(7) To pay to German nationals such amounts as will make the aggregate payments equal to 50 per centum of the amounts awarded under section 3 (on

account of ships, patents, and radio stations). Payments authorized by this paragraph or paragraph (6) may, to the extent of funds available under the provisions of subsection (d) of this section, be made whether or not the payments under paragraph (1) to (5), inclusive, of this subsection have been completed;

(8) To pay accrued interest upon the participating certificates evidencing the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld);

(9) To pay the accrued interest payable under subsection (c) of section 2 (in respect of awards of the Mixed Claims Commission) and subsection (h) of section 3 (in respect of awards to German nationals);

(10) To make such payments as are necessary (A) to repay the amounts invested by the Alien Property Custodian under subsection (a) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of 20 per centum of German property temporarily withheld), (B) to pay amounts equal to the difference between the aggregate payments (in respect of claims of German nationals) authorized by subsections (g) and (h) of section 3 and the amounts previously paid in respect thereof, and (C) to pay amounts equal to the difference between the aggregate payments (in respect of awards of the Mixed Claims Commission) authorized by subsections (b) and (c) of section 2, and the amounts previously paid in respect thereof. If funds available are not sufficient to make the total payments authorized by this paragraph, the amount of payments made from time to time shall be apportioned among the payments authorized under clauses (A),

(B), and (C) according to the aggregate amount remaining unpaid under each clause;

(11) To make such payments as are necessary to repay the amounts invested by the Alien Property Custodian under subsection (b) of section 25 of the Trading with the Enemy Act, as amended (relating to the investment of the unallocated interest fund); but the amount payable under this paragraph shall not exceed the aggregate amount allocated to the trusts described in subsection (c) of section 26 of such Act;

(12) To pay into the Treasury as miscellaneous receipts the amount of the awards of the Mixed Claims Commission to the United States on its own behalf on account of claims of the United States against Germany; and

(13) To pay into the Treasury as miscellaneous receipts any funds remaining in the German special deposit account after the payments authorized by paragraphs (1) to (12) have been completed.

(d) 50 per centum of the amounts appropriated under the authority of section 3 (relating to claims of German nationals) shall be available for payments under paragraphs (6) and (7) of subsection (c) of this section (relating to such claims) and shall be available only for such payments until such time as the payments authorized by such paragraphs have been completed.

(e) The Secretary of the Treasury is authorized to pay, from funds in the German special deposit account, such amounts, not in excess of $25,000 per annum, as may be necessary for the payment of the expenses in carrying out the provisions of this section and section 25 of the Trading with the Enemy Act, as amended (relating to the investment of funds

by the Alien Property Custodian), including personal services at the seat of government.

(f) The Secretary of the Treasury is authorized to invest and reinvest, from time to time, in bonds, notes, or certificates of indebtedness of the United States any of the funds in the German special deposit account, and to deposit to the credit of such account the interest or other earnings thereon.

(g) There shall be deducted from the amounts first payable under this section to any American national in respect of any debt the amount, if any, paid by the Alien Property Custodian in respect of such debt which was not credited by the Mixed Claims Commission in making its award.